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*Repts* *Upper Canada Repts.*  
Co REPORTS OF CASES *Common Pleas*

DECIDED

IN THE

# COURT OF COMMON PLEAS

OF

UPPER CANADA ;

FROM HILARY TERM 20 VICTORIA, TO HILARY TERM 21 VICTORIA.

BY

EDWARD C. JONES, ESQUIRE,

BARRISTER-AT-LAW.

1856-57

VOLUME VII.

TORONTO:

R. CARSWELL.

1877.



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III

JUDGES  
OF  
THE COURT OF COMMON PLEAS,  
DURING THE PERIOD OF THESE REPORTS.

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THE HON. WILLIAM HENRY DRAPER, C. J.  
“ “ WILLIAM BUEL RICHARDS, J.  
“ “ JOHN HAWKINS HAGARTY, J.





A

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REPORTS OF CASES  
IN THE  
COURT OF COMMON PLEAS

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EASTER TERM, 20 VICTORIA.

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Present—The HON. WILLIAM BUELL RICHARDS, J.  
“ JOHN HAWKINS HAGARTY, J.

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ALDWELL V. HANATH.

*Replevin—Sewerage rate—Voluntary payment.*

Certain premises in the city of Toronto which drained into a ravine were demised by the defendant to one J. T. A., of whom the plaintiff in replevin was assignee. The city of Toronto in making improvements closed up this ravine, and thereby occasioned an accumulation of water on the premises in question, rendering a drainage into the common sewerage necessary. The plaintiff then drained his premises into such sewer, and paid the frontage or sewerage rate charged by the city by-law upon the proprietor of the property, and claimed to set off the amount of such payment against the defendant's rent.

*Held*, on demurrer that such payment was voluntary and could not be recovered back from the defendant although it might enure to his benefit.

*Quære*, whether the tenant is not liable under his covenant to pay taxes, See Metropolitan Board of Works v. The Vauxhall Bridge Company, 29 Law Times, 211.

This was an action of replevin for goods and chattels: to wit, malt and barley worth £80 taken in a certain brewery in the city of Toronto, called the Victoria Brewery.

*Avowries*—1st. That one John Thomas Arnold held the premises as tenant thereof to the defendant by virtue of a certain demise, and because a large sum, to wit, £80 was due from the said John Thomas Arnold to the defendant for rent on the same; the defendant then seized the goods in the nature of a distress for the said rent so due and in arrear.

2nd. That defendant demised the premises to one John Thomas Arnold, who assigned his term to one Weymouth

Schreiber and that certain rent being due on the said premises from the said Weymouth Schreiber as assignee of the said John Thomas Arnold to the defendant, the said goods were taken as in the nature of a distress for rent, and setting forth the indenture of assignment.

*Pleas*—To the first avowry, set forth that under and by virtue of a certain by-law of the city of Toronto a certain sewerage rate was ordered to be levied upon the proprietors of real property of five shillings per foot frontage as and for the right of drainage into the common sewers; that the premises in question had a certain frontage of 194 feet on Victoria Street; that the defendant would not pay the sewerage rate, and that by reason thereof the premises in question of which the plaintiff was tenant, and which drained into a natural ravine—the mayor, aldermen, and commonalty of the city of Toronto, for the improvement of health having closed up such ravine—were left without drainage; that the water on said premises accumulated and became stagnant, and that plaintiff was summoned before the police magistrate and fined therefor, and because the said brewery would be useless without drainage, and said waters again accumulated, the plaintiff was obliged to drain into the common sewer on Victoria Street. Averment, that defendant as proprietor of the said brewery was liable to pay the rate levied under, and by virtue of the said by-law: that the defendant not having paid the same, the plaintiff paid the said sewerage rate as aforesaid unto the Chamberlain of the city of Toronto—to wit, the sum of £48 10s., and that before the commencement of the suit he tendered and offered to the defendant the difference between such sewerage rate and the rent due.

To the second avowry a similar plea.

The defendant demurred to the above pleas on the following grounds: 1st, that the facts set forth in the said pleas did not excuse the plaintiff from the payment of the entire rent for the term, and in the amount mentioned in the defendant's avowries. That the sum paid by the plaintiff for sewerage rate could not form a set-off against such rent. That the payment of such rate was voluntary. That it was not



stated that defendant was ever requested or refused to pay the same.

The case was argued on 6th June, 1857; *Read* for demurrers to the plea to defendant's avowry, contends that the by-law set out by the plaintiff is void; that under provincial statute 16 Vic. ch. 81, sec. 15, sub-section *one*, only an *annual* rent charge can be collected from those who use the sewer, whilst the by-law set forth imposes the payment of a sum certain for the privilege of using it, not in the nature of an annual charge, but as a specific sum to be paid down. That the payment by defendant was voluntary, and therefore could not be set off against the rent.

*Hallinan* for the pleas contended that the plaintiff was, for the causes set forth in the plea, compelled to pay the sewerage tax or rate prescribed by the by-law whether the same was legal or not, as the premises would be practically useless to him if they were not drained: that the by-law itself imposes the rate upon the *proprietor*, and therefore the payment by plaintiff was in fact so much money paid to the use and for the benefit of the defendant, and in relation to the premises the defendant occupied, and therefore could be properly set off. He contended this payment was analagous to the payment of the property tax by a tenant in England, and could be deducted from the rent. He referred to *Swatman v. Ambler et al.* (24 L. J. Ex. 185), *Cumming v. Bedborough* (15 M. & W. 438), and *Franklin v. Carter* (1 C. B. 750).

RICHARDS, J., delivered the judgment of the court.

The effect of the plaintiff's pleas to the avowries of the defendant is that the premises were formerly drained into a ravine: that the corporation for the purpose of improving Victoria street closed up that ravine, and that in consequence water accumulated on the premises and became stagnant. That plaintiff was fined for an infringement of the city laws in relation to public health, and because without drainage the brewery would be useless to him, and he would be liable to be fined when water became stagnant on the premises, he was obliged to drain into the common sewer on Victoria Street. He then avers that under the city by-law defendant as *proprietor* of the brewery

became liable to pay the rate of 5s. per foot frontage of the property drained into the said common sewer, and that defendant not having paid the same to the plaintiff before the time when, &c., and the commencement of the suit, being tenant and occupier of the brewery, in which, &c., and the same being useless without drainage, and having been fined, and being liable to be fined for such non-drainage, paid to the Chamberlain of the city £48 10s., being the amount which defendant by virtue of the by-law as proprietor was liable to pay as sewerage. He concluded by averring tender of the balance of the rent.

There is nothing in these pleas to shew that plaintiff was bound to pay the sewerage tax, or that it was a charge on the premises which could be levied of the tenant, or out of any distress that might be found on the premises. For any thing that appears on these pleas the payment was a voluntary one on the part of the plaintiff, and the only ground on which any duty or liability to pay the money is cast on the defendant seems to be, because the corporation stopped up the ravine into which the premises were formerly drained, plaintiff, in order to drain them and save himself from being fined for keeping stagnant water on them, was obliged to drain into the city sewer. It is stated, thereby defendant as proprietor became liable to pay; if so, why was he not asked or compelled to pay? It is not asserted that he was called upon to pay, or had notice that he was considered liable. The defendant does not appear to have done any thing since he granted the lease to prevent the plaintiff from the free enjoyment of the property, whatever was done in that respect was the act of the corporation, and they were either legally authorised to do these acts or not. If they were not so authorised, and plaintiff was injured in consequence, he could bring his action against them. If they were authorised, and the premises in consequence of what they did, became useless to the plaintiff without proper drainage, I do not think, unless there was a special provision to that effect in the agreement between the parties, that plaintiff could make drains and charge the expense to defendant, and if not, why could he compel defendant to pay what is

commonly called the frontage tax for drainage. The only ground, as far as I can see, on which it can be claimed from defendant is, because in the city by-law it is stated that it shall be charged upon the *proprietors* of property. The corporation by their by-law, cannot change the legal rights of the parties. Suppose the premises at the time they were leased by defendant were drained by an expensive sewer, and during the term this sewer got out of order, whereby the premises became useless, and the tenant expended £50 to put the drain in order; could he on this state of facts, without any covenant to repair by the landlord, and without any notice to or request by him as to these repairs, deduct that amount from the rent? I should think not; then why can he be permitted to do so in relation to the amount paid for the privilege of using a sewer made by the corporation. It can only be because such charge is in the nature of a tax imposed on the premises, and for which a distress might be made on the tenant, and which he is thus compelled to pay. It appears from the pleadings that the tenant is bound to pay the taxes. I do not then see how plaintiff can escape from this position; either the rate imposed is a tax which under the lease the tenant is bound to pay, or it is a charge in the nature of a specific sum for the use of a drain for all time to come, which if the tenant wishes to use he pays for, as he would for the introduction of gas or water into the premises. If it be a tax on the landlord, he ought to be permitted or compelled to pay it himself. I do not see that the compulsion to pay referred to in the pleas is that kind of compulsion which would enable the plaintiff to recover back the money paid, because the privilege obtained by this payment might enure for the benefit of the landlord. That may be said of moneys paid by a tenant for any permanent improvement in the nature of fixtures on premises, which would ultimately go to the benefit of the landlord; the mere payment of money which another may be bound to pay does not necessarily imply that the person for whose benefit such payment may enure shall be bound to refund or allow it to the party paying. There must be some request to pay, either express or implied, to raise a promise to repay, or some legal

right or authority to do so, and recover it from the party for whose benefit it is alleged to be paid; a mere voluntary payment for another, cannot be recovered back.

There is no analogy between this case and the payment of the property tax by the tenant in England under (5 & 6 Vic., ch. 35), that tax is imposed on the premises and not on the landlord personally, and by the express provisions of the act the occupier being tenant and paying the duties shall be allowed to deduct the proportion payable by the landlord out of the first payment thereafter to be made on account of rent. So strictly is the statutory provision followed there, that if the tenant does not deduct the amount from the next rent to be paid, it is said he cannot afterward so recover it from the landlord, either by deduction from the rent, or as money paid to his use. But there is no such provision here in relation to the sewerage rate, and if it comes under the general rule as to taxes, the tenant by the lease is bound to pay them.

In the view we take of the case it is not necessary to decide whether the by-law is legal or not, that question is before us in another form.

After considering the point raised on the demurrer to the pleas to the defendant's avowries, we are of opinion that they fail to shew any legal grounds to resist the claim of the landlord for his rent. If the plaintiff was by law bound to make these payments, he has failed to shew any legal liability on the part of the landlord, to allow the amount paid on account of the rent.

In Crabb's Law of Real Property, p. 199, vol. 1. sec. 196, it is laid down as a rule, that no payment made, or damages sustained by a tenant, can be set off against a claim for rent except as payment for ground rent, or for the land tax under stat. 38 Geo. III., ch. 5, sec. 17, which requires such deductions to be allowed, or the property tax, or other rates regularly assessed on the landlord, or where a tenant is compelled to make any payment which the landlord is bound to make in order to save himself from being ousted; or where a tenant is compelled to make repairs which the landlord is bound to make; or where there is a special agreement



that the tenant may deduct from the rent moneys due from the landlord.

There will therefore be judgment for defendant on the demurrers to the pleas to the avowries.

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MOODY (SHERIFF) V. BULL ET AL.

*Attachment—Writ of—Effect of final order for protection from process—Set-off*

C., one of the obligees, in a bond of indemnity given to the sheriff under a writ of attachment against the goods of an absconding debtor, filed his petition for protection from process and afterwards obtained a final order thereon. Judgment was obtained in an action against the sheriff subsequently to the filing of the petition and the bond, but was not referred to in C's. schedule thereto.

*Held*, that the sum recoverable by the sheriff upon such bond was not a "debt contracted payable on a contingency," or a "liability," under 19 & 20 Vic., ch. 93, from which C. was discharged by such final order.

*Held*, also, that the obligees in such bond were not entitled to set off against the sheriff's claim, money the sheriff had applied out of the proceeds of the sale under the attachment to pay certain executions placed in his hands prior to such attachment.

DECLARATION, on debt on bond. The defendants crave over and set out the bond, which was dated the 8th of March, 1856. It recited the issue, at the suit of Bull and Cuvillier, out of the Court of Common Pleas, of a writ of attachment against the goods and chattels and real estate of George Hart and George Alexander Hart, absconding debtors; the delivery of the same to the plaintiff to be executed; the seizure thereunder of certain specified goods and chattels, at the request of Bull and Cuvillier; and the agreement of the defendants to indemnify the plaintiff and his officers by reason of such seizure, and the subsequent or any sale and disposal thereof. The condition was, if the obligors should at all times save harmless, and keep indemnified, the plaintiff and his officers from all damages, costs, trouble, as well of prosecution as of defence, which should accrue, by reason of such seizure and the subsequent sale thereof, and in case of the same so happening should pay the same without first insisting on the sheriff paying the same before suing therefor, and in all things save harmless the sheriff and his officers, then the bond to be void; otherwise, &c. The defendants pleaded generally, *non damnificatus*.

Second plea by Cuvillier.—That on, to wit, the 11th of February, 1857, he filed his petition for protection from process in the Insolvent Court of the county of Hastings, and presented the same to the judge of the court, in which county he had resided for twelve months previous; and he presented his petition after the passing of the statute 20 Vic., ch. 93: that he had been a trader in Upper Canada within the meaning of the Bankrupt Act, 7 Vic., ch. 10, and since the expiration of that act became insolvent, and by reason of the said expiration was unable to avail himself of its benefits: that he obtained his final order from the said court, and the said bond was made and debt contracted before the filing of said petition, and thereupon he was duly discharged from the same cause of action.

The plaintiff applies to the first plea, sets out the recovery of a judgment against him and one Jacob Bonter, his bailiff, by one Alexander P. Wight, in the court of Common Pleas, for taking the goods and chattels in the writing obligatory, and condition mentioned of which defendants had notice, the issuing of executions thereon, placing the same in the coroner's hands, and the payment of the sheriff of £482 3s. 10d. to satisfy the same; and that in defending the said suit he became liable to pay, to wit, £50. He then avers defendants have not indemnified him for this. To the second plea by Cuvillier plaintiff says, that he was not nor is discharged by the final order therein mentioned from his liability to pay the moneys sought to be recovered in this cause.

The defendants take issue on these replications.

At the trial, before *McLean*, J., at the last Cornwall assizes, it appeared that the amount paid by the sheriff on the *fi. fa.* in the suit against him, in full for damages, costs, and coroner's fees, was £482 3s. 10d.

The amount of plaintiff's claim, exclu-

sive of costs of defence,.....	487	16	4
Costs of defence.....	30	0	0
Verdict for plaintiff: damages.....	517	16	4

For defendants *Walbridge*, Q. C., urged that certain

moneys, the proceeds of the sale under the attachment, which had been applied to pay certain executions in the sheriff's hands which came there prior to the attachment, ought to be allowed in reduction of the damages. He also moved for a nonsuit as to Cuvillier, on the ground that by the certificate from the Insolvent Court he was discharged from this claim.

The learned judge overruled the objections, but gave leave to move on both grounds.

In Easter Term last, *Walbridge*, Q. C., obtained a rule to shew cause why the verdict against Cuvillier should not be set aside, and a verdict or nonsuit should not be entered for him, or why the verdict should not be reduced by the sum of £91 5s. 6d., pursuant to leave reserved.

During the term *Bell*, of Belleville, shewed cause, and contended that the claim of the plaintiff against the defendant Cuvillier was not bound by the final order obtained by him, either under the Insolvent Acts, or the Bankrupt Act: that the effect of the final order would only be to free him from such debts and liabilities as were mentioned in his schedule of debts: that plaintiff's demand was not entered in the schedule, and could not be entered, as it was not a debt due or claimed to be due to any person (at the time of filing the petition) named in the schedule as a creditor, or for which such person had given credit to such petitioners before the filing of such petition (8 Vic., ch. 48, sec. 29); nor was it a *sum of money* payable by way of annuity, or otherwise, at any future times by virtue of a bond (as section 32). He further contended it was not a *debt contracted*, payable on a *contingency* and proveable under the Bankrupt Acts by the 9 Vic., ch. 30, sec. 32. He referred to *Amot v. Holder*, 17 Jur. 318; *Exparte Modd*, 25 L. T. 285; *Margett v. Supper*, 25 L. T. 246; *Young v. Winter*, 16 C. B. 401; Provincial Statute 19 & 20 Vic., ch. 93, 7 Vic., ch. 10, sec. 59, 8 Vic., ch. 48, secs. 1 and 4; *Perrin v. Hamilton*, 5 U. C. C. P. Reps. 57; *Hawkin v. Bennett*, 8 Ex. 107. As to insolvent being only entitled to be discharged from debts mentioned in the schedule, he referred to *Leonard v. Baker*, 15 M. & W. 202; *Hoyles v. Blore*, 14 M. & W. 387; *Yearsley v. Hearn*, 14 M. & W.

322; *Simons v. May*, 6 Ex. 707; *Lambert v. Smith*, 11 C. B. 358; *Owen v. Rowth*, 14 C. B. 327.

He further contended, that the sums paid by the sheriff out of moneys realised under the attachment to satisfy execution creditors could not be deducted from his claim under this bond: that he was bound by law to give these creditors their legal preference; and at all events, if he had not properly applied the money, he could be made responsible for it. It was neither a cause of set-off, nor for reduction of damages. He referred to *Bank of British North America v. Jarvis*, 1 U. C. Q. B. R. 182.

*Walbridge*, Q. C., in support of his rule, contended that the discharge operates not only to extinguish all debts due at the time of filing the petition, but also all debts which were provable under the Bankrupt Laws, when they were in force. He also contended, that under 19 & 20 Vic. ch., 93, sec. 2, the final order operated as a discharge "of all debts or *liabilities* due or *contracted* up to the time of the presentment of the petition;" and that this extends the discharge, further than it went either under the Bankrupt or Insolvent laws. He also argued, that the bond gives the sheriff a right to sue whether he has paid the money or not; and therefore the moment the rule for a new trial was discharged in the suit against the sheriff, the right to sue on the bond became vested in him.

It was admitted on the argument that Cuvillier's petition to the Insolvent Court was filed 10th of February, 1857; rule *nisi* for a new trial in the suit against the sheriff discharged 24th of February, 1857; first meeting of creditors, 27th of February, 1857; final order meeting, 20th March, 1857; judgment entered in suit against the sheriff, 21st of March, 1857; final order granted, 24th March, 1857.

RICHARDS, J., delivered the judgment of the court.

The nature of demands provable under the Bankrupt Acts was fully considered in the case of *Perrin v. Hamilton* (5 U. C. C. P. R. 57.) The ground on which the majority of the court then decided, that a bond by a surety could be provable under the commission, was that default had been made in some of the payments under the bond, due before the date of the



commission ; and the bond having thereby become forfeited, it became a *debt* which could be proved, instead of a contingent liability, which might have ripened into a debt.

In the case before us it appears to me that the bond given by defendants to plaintiff was a mere indemnity bond ; it was not a "*debt contracted payable on a contingency*," nor had there been any forfeiture at the time the defendant Cuvillier filed his petition in the Insolvent Court, so that the penalty of the bond could be considered a debt. At the time of the filing of the petition it was doubtful if it would ever create a *liability* even.

This demand was not entered in Cuvillier's schedule, and it does not appear to be one of that class which is provable under the Insolvent Act ; there is therefore much in the argument that the effect of the final order would be merely to discharge him from the debts and liabilities mentioned in the schedule and provable under that act. This demand is not provable under the Bankrupt Acts, nor was it a debt for which the plaintiff, under the 9 Vic., ch. 30, sec. 32, could have applied to have had an amount retained in the hands of the assignees (if that act were now in force) until the contingencies happened, and then have proved his debt.

In *Perrin v. Hamilton*, Chief Justice *Macaulay*, in reference to the class of contingent demands for which parties may claim, observes : "When the *matter or amount* secured by the terms of the condition is *undefined* and too uncertain, it cannot be treated as a *debt* secured. But when the *amount and time of payment are both specified and certain*, it becomes in connection with the *forfeited penalty*, a *debt absolute* ; or, if not payable by the condition, a debt due under the penalty, though, under the condition, only payable on a contingency (whatever it may be), whether upon the happening of such contingency the obligor will forthwith become absolutely indebted in or liable to pay a *sum or amount certain* by the terms of the condition, the *amount* of which might therefore, by virtue of the forfeited penalty, be retained under the provincial statute 9 Vic., ch. 30, sec. 32, to await the contingency."

As to the clause in the condition of defendants' bond,

which mentions, “ in case the *same* (that is, damages, costs, trouble, &c., which shall or may happen, fall upon or accrue, by reason of such seizure and sale) so happening, if they do and shall pay the same without first insisting on the sheriff paying the same before suing therefor,” I cannot see how this can alter the position of the parties as to the point under discussion. Parties may sue for claims which are not provable under the Bankrupt Acts; if they obtain judgments as to them before an act of bankruptcy, they then become debts, and may be proved under a commission; but if after verdict in such a case a party does not enter judgment until after the certificate, the bankrupt is not discharged. The case of *Hawkin v. Bennett* (8 Ex. Reps. 107) appears to me to be strong authority on this, as well as other points of the case, in favour of the plaintiff. *Owen v. Rowth* (14 C. B. 327) shews when the claim is only for damages at the time of the bankruptcy, the certificate is no discharge. As to the second section 19 & 20 Vic., ch. 93, it does not appear to me reasonable to infer that the legislature intended to give by that section any greater effect to the final order than would be given to the bankrupt certificate referred to. The words are, that the final order shall operate as a discharge of all debts or *liabilities* due or contracted up to the time of the presentment of the petition under the first section of the Insolvent Act in each case respectively, as fully and completely and to the same intent as if such trader had obtained a certificate under the 59th section of the Bankrupt Act.

The only ground on which this section can be held to aid the defendant *Cuvillier* is, that the claim in this action was a *liability*, contracted before the presenting of the petition in the Insolvent Court. It seems to me the proper reading of this section is, to consider it limited to such *liabilities* as may be proved, or claimed, under the statute, or at all events, under the Insolvent and Bankrupt Acts. The policy of the Bankrupt Acts is to take from a party all his effects, and to relieve him from his debts, and to give to those who have demands upon him a remedy on his estate, instead of his person or after-acquired property. In enquiring whether a

party is discharged from a particular claim, the question is asked, could the plaintiff have ranked on the bankrupt's estate for it; and if not, then it is generally understood that settles the case. Unless it can be shewn that the plaintiff could have proven this demand against the estate of the defendant, either in insolvency or bankruptcy, I do not think we ought to hold that the legislature intended to discharge the defendant Cuvillier from it.

The case of *Young v. Winter* (16 C. B., 401), and the case in the notes decided under the amended English Bankrupt Act 12 & 13 Vic., 106, I think supports my view. I also refer to *Exparte Foster* (9 C. B. 422), *Exparte Marshall* (1 M. & A. 118, 145, 3 D. & C. 120), commented on in *Perrin v. Hamilton*, as a case most like this in its facts, and as I understand it leads to a conclusion fatal to the defendants' position.

As to reducing the damages, we think the argument of the plaintiff's council conclusive on that point. It is no ground of set-off; and if the plaintiff is bound to pay over the amount to Bull & Co., to apply on their attachments, they have their remedy against him.

*Per Cur.*—Rule discharged.

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### COCHRAN V. WELSH.

#### *Wrongful distress—Demurrer.*

Count in a declaration for a wrongful distress, admitting that *some* rent was due—*Held*, bad on demurrer.

The first count of the declaration was in the usual form for an excessive distress. The second count, which was demurred to, was as follows :

And whereas, also, the plaintiff, before the committing of the grievance hereinafter mentioned, held a certain farm, messuages, lands, and premises, of the defendant, as tenant thereof, to the defendant, at and under a certain rent therefor payable by the plaintiff to the defendant; yet the defendant wrongfully and unjustly contriving to ruin the plaintiff, wrongfully and unjustly seized and took, in and upon the said tenements, with the appurtenances, divers goods and chattles of the plaintiff, to wit, two blood horses, six cows, six sheep, ten pigs, one waggon, one sleigh, and

one set of harness, of great value, to wit, the sum of five hundred pounds, as and for a distress for certain alleged arrear of the said rent [to wit, the sum of eighty-one pounds, by the defendant then pretended to be due and in arrear to the defendant for the said tenements], and afterwards detained the same as such distress for such pretended arrears, under colour of such distress, until the plaintiff afterwards, to wit, on the twenty-second day of November, in the year of our Lord one thousand eight hundred and fifty-five, was compelled to pay, and did pay to the defendants, the said pretended arrears of rent, and a further sum of five pounds for costs and charges of said distress, in order to regain possession of the said goods and chattels; whereas, in truth and fact, at the time of making of the said distress, and during all the time aforesaid, a small part only, to wit, the sum of sixty pounds of the said pretended arrears of rent, so distrained for, was in arrear to the said defendant for the rent of said tenements. And the plaintiff claims five hundred pounds.

This case was argued on Saturday, the 6th of June, by *Bell* for the plaintiff, and *McMichael* for the defendant.

RICHARDS, J., delivered the judgment of the court.

The case of *Glyn v. Thomas*, in the Exchequer Chamber, reported in 11 Exchequer Reports 870, is expressly in point; and unless we are prepared to overrule that authority, we must give judgment for the defendant on the demurrer to the second count of the declaration. We have carefully gone over the cases cited, and fully concur in the reasoning by which the learned judges in the Exchequer Chamber arrived at their conclusion in *Glyn v. Thomas*. We do not feel that we could properly reject as surplusage so much of the count as would make it one merely for an excessive distress, when it was undoubtedly framed to make the defendant liable in a different way, and to charge him, as a distinct cause of action, with causing the defendant's goods to be seized as a distress for a larger sum for rent than was really due,—the other count in the declaration being for excessive distress.

Judgment for defendant, on demurrer.



## LANE V. THE MONTREAL TELEGRAPH COMPANY.

*Damages—Measure of.*

The plaintiff, a ship owner, having been induced by the defendants' error in the transmission of a message to suppose he could obtain a cargo of 8,000 instead of 3,000 bushels of wheat from Chatham to Oswego, abandoned a contract for a cargo from Detroit, and sent his vessel to Chatham, whence it sailed with a cargo of 3,000 bushels only.

*Held*, that the damages which naturally resulted from the defendants' breach of duty were the expenses of sending the vessel to Chatham and back, and that the plaintiff was not entitled to claim the profit he might have made from carrying the 8,000 bushels.

The action was for incorrectly transmitting a telegraphic message from Windsor to Chatham, the real message being an enquiry if the party to whom the plaintiff's message was sent could load his vessel with *eight* thousand bushels of wheat, whilst the message transmitted was *three* thousand; and on receipt of an affirmative answer, plaintiff sent the vessel from Detroit to Chatham, and thereby not only lost the freight of *five* thousand bushels of wheat from Chatham to Oswego, in the State of New York, but also the time of the vessel going to Chatham, and the wages of the crew during such lost time, and demurrage.

Interlocutory judgment was signed. At the trial, before *Richards, J.*, at the last spring assizes at Sandwich, it appeared that the plaintiff had obtained a cargo of corn for his vessel, 8,000 bushels, from Detroit to Ogdensburg. The parties who had agreed to furnish the cargo were desirous of keeping the corn at Detroit, and wished the plaintiff to allow them to withdraw from their agreement, stating to him that perhaps he could get another cargo for his vessel. In endeavouring to find other freight he delivered the telegraphic message referred to, to be sent to Chatham; and on receiving the answer, supposing he would get the freight of *eight* thousand bushels at Chatham, he, in consideration of \$100, released the party from his engagement to ship the corn, and sent his vessel to Chatham. On arriving there the mistake referred to was discovered, and the vessel took in but three thousand bushels of wheat, being all that could be got there, and returned to Detroit, where she sought more freight, and finally went to Oswego with only the 3,000 bushels.

The plaintiff claimed as damages the full freight from Chatham to Oswego on the 5,000 bushels of wheat which the vessel could have carried, and expected to get, more than was received at Chatham.

The presiding judge directed the jury that inasmuch as it did not appear that the defendants' clerk or agent at Windsor, to whom the message was delivered, was informed of the agreement plaintiff had made about the cargo of corn, and his intention of giving it up in the event of his being able to get a full freight of wheat at Chatham, the company could not be considered as undertaking to send the message on the terms of paying damages in the event of any mistake in relation to it for abandoning a contract of which they or their agents did not know anything; and, consequently, that that claim ought not to be allowed. He however told them it would be reasonable to suppose that the plaintiff might send his vessel from Detroit where she was to Chatham to get the freight; and if he did this on the faith of the defendants' exercising reasonable and proper skill in their business, and when his vessel reached that port he found there was no freight for him, or only a proportionate freight, he might return to Detroit, and if the defendants were liable at all, the fair measure of damage was what it was worth to send the vessel to Chatham and bring her back on this bootless voyage. The jury found in this view that the fair compensation to the owner of a vessel to send her from Detroit to Chatham and bring her back was £25: on this the assessment of damages was entered for the plaintiff at that sum. The jury were also asked what damages the plaintiff ought reasonably to have considering the vessel got part of her cargo, and plaintiff choosing to take the 3,000 bushels rather than come back to Detroit with his vessel, and claim the damages for taking her from Detroit to Chatham and back. As to this the jury found £12 10s, being as they said for his trouble in seeking freight to fill up his vessel. They were also asked, what was the fair damages which the plaintiff ought to have for not getting the freight on the additional 5,000 bushels, if the court should be of opinion that he had a legal claim for such damages; and they found £118 15s. Leave was given to

the plaintiff to move to increase the verdict to £37 10s., or £118 15s. if the court should be of opinion that the plaintiff could, under the facts, claim either sum.

In Easter Term *Albert Prince* moved, pursuant to the leave reserved.

*McMichael* shewed cause. He referred to *Hadly v. Baxendale*, 9 Ex. 341; *Watrous v. Bates*, 5 U. C. C. P. 366, and *Mayne on Damages*. Mr. *Prince* referred to *Waters v. Towers*, 8 Ex. 401.

RICHARDS, J., delivered the judgment of the court.

We are of opinion that the ruling of the judge at *nisi prius* was right. The only damages which would naturally flow from the default of the defendants, or which, under the facts stated, could have been in the contemplation of both parties at the time, was reasonable compensation for sending the vessel to Chatham and returning without a freight. If when he went to Chatham he thought it would be to his interest to take the 3,000 bushels, rather than return without any freight, it might be contended that *pro tanto* his claim for damages should be reduced; and that as the jury found that £12 10s. would be a fair sum to allow for seeking for freight to make up the remainder of a load, the damages ought to be reduced by that sum. As, however, the defendants have not asked for that reduction, we do not feel disposed to give it, even if it was clear that the law might be thus rigidly construed in their favour.

The claim for loss of freight, either as to the 5,000 bushels which the plaintiff expected to get, more than he obtained at Chatham, or as to the corn, the contract to carry which it is stated he gave up in consequence of the message which he received in reply to the one sent, and in the sending of which the mistake was made, we do not think the plaintiff entitled to recover. It does not appear that he could have obtained a freight of *eight* thousand bushels if the message had been correctly transmitted. If he had been answered in the negative, he would then have insisted on his right to carry the corn according to his contract for that purpose. The real damage he sustained therefore was for

giving up that contract. This is not alleged in the declaration as special damage, nor, as has already been stated, was the fact of such a contract having been made communicated to the defendants' servants at the time the message was sent, so that it cannot be said, that damages in relation to it were in the contemplation of both the parties at that time. Under the facts shewn, we think the damages should stand as assessed, at £25, being for the expenses of sending the vessel from Detroit to Chatham and back, which are the damages that naturally flowed from the breach of the defendants' duty or contract, or which might have been reasonably in the contemplation of the parties at the time.

Rule discharged.

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WRIGHT ET AL. V. JENNINGS.

*Affidavit—Title of cause.*

Where the title of the cause had been reversed by placing the defendant's name before the plaintiffs', the court refused to receive them.

The rule was granted, on the affidavit of the defendant that he had not purchased the goods (liquors), the subject of the action, from the plaintiffs. *D. B. Read*, supported the rule, and contended that the affidavit of the plaintiffs' agent in reply was not sufficient. *McMichael* shewed cause, and took the preliminary objection that the defendants' affidavits are entitled, Richard Jennings, defendant, *ats.* Josiah P. Wright et al., plaintiffs, instead of Wright v. Jennings; and they cannot be read. He also filed the affidavit of one Burr, the plaintiffs' agent, who swore positively he sold the liquors to the defendant. *Richards v. Isaac*, 2 Dowl. 710.

We think the rule must be discharged on both grounds.

Rule discharged, with costs.

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## COMSTOCK V. THISTLE.

*Plea in bar—Assessment of damages.*

Upon an assessment of damages for goods sold an attempt was made on the part of the defendant to prove a contract to deliver the goods in Toronto free of charge, and that they were refused by the defendant in consequence of their arriving with charges on them, and the jury found nominal damages only.

*Held*, that such matter should have been pleaded in bar, and was not available for the defendant on an assessment of damages.

ASSUMPSIT for goods sold—*nil dicit*.

This was an assessment of damages before *Hagarty, J.* at the last Hastings assizes. Plaintiff is a patent medicine vendor in New York. Defendant resides in Canada West. Plaintiff's case was proved by a commission. The goods claimed for by plaintiff amounting to \$49.75 were proved to have been forwarded to Canada on an order therefor by defendant, mentioning the price of the goods, a term of credit, but not making any provision for the transport of the goods or the payment of duties thereon.

On the defence a brother of the defendant proved that when the order was given the understanding between the parties was that the goods were to be delivered in Toronto for defendant free of charge: that they came to Toronto with charges on them, and defendant then refused to receive them.

This evidence was taken subject to plaintiff's objections—1st. That it varied the terms of the written order. 2nd. That it could not be received on the assessment of damages, being properly matter in bar. The jury were told that plaintiff must recover something, and that they were to consider the truth of the defence whether the real contract was as the defendant contended or not.

The jury found 1s. damages, and leave was reserved to the plaintiff to move to increase the verdict to full amount claimed, viz., \$49.75, if the court should support plaintiff's objections to defence offered.

In Easter term *Jellett* for plaintiff moved accordingly to increase verdict on the leave reserved.

HAGARTY, J., delivered the judgment of the court.

We are of opinion that the rule must be absolute to in-

crease the verdict. The evidence given was matter which if true barred the claim altogether, and would have entitled the defendant to succeed, had he pleaded in bar. The principle seems well settled by many cases. *Speck v. Phillips*, (5 M. & W. 279) is very emphatic and clear on the subject.—*Watson v. Glover* 12 L. J. N. S., 184 C. P., and many older cases.

Rule absolute to increase the damages to £12 8s. 9d.

Rule absolute.

### HALLOCK ET AL. V. WILSON.

#### *Mortmain—Enrolment—Estoppel.*

Registration in the county registry office in Upper Canada. *Held* sufficient to make a deed valid under the Statutes of Mortmain, without enrolment in Chancery.

*Quære*, whether a tenant or licensee of land is estopped from disputing his landlord or licensor's title as void on a statutable objection?

**EJECTMENT.** At the trial before *Richards, J.*, at Sandwich, the plaintiffs shewed a paper title in themselves, by deeds admitted under notices in the usual manner, and it was also admitted that defendant had entered into possession under them with a view to and under agreement to purchase the land sought to be recovered.

The plaintiffs immediate title was by deed dated 4th of October, 1852, from James Dougall to them in fee, adding to the names of the grantees the words, "Trustees of the Refugee's Home Society."

The *Habendum* was simply to plaintiffs, their heirs and assigns, in fee absolutely, without any trust; consideration expressed in deed, £193 3s.

Defendant went into evidence to shew that plaintiffs were trustees of the society mentioned, and that it was a charitable society, for the settlement and assistance of refugees from slavery. Defendant then objected generally that the conveyance to plaintiffs was void under the Statutes of Mortmain. Verdict was taken for plaintiffs subject to the opinion of the court on that question.

The case was argued in Easter Term, by *Prince* for plaintiff, citing—*Doe dem. Preece v. Howells*, 2 B. & Ad. 744; *Whicher v. Hume*, 16 Jurist, 391; *Blandford v. Thackerell*, 2 Vesey, 241; *Edwards v. Hall*, 17 Jurist, 593; *Shelford Mort.*, 103, 141.

*O'Connor* for defendant, cited—13 & 14 Vic., ch. 63, sec. 6; 4 Wm. 4, ch. 1, sec. 47; *Doe Williams v. Lloyd*, 1 Scot. N. R. 505, 1. M. & G. 671; *Doe Howson v. Waterton*, 3 B. & Ald. 149; *Doe Anderson v. Todd*, 2 U. C., 82. On the argument defendant contended that plaintiff should have proved this deed was for value; a point not specially urged at the trial.

HAGARTY, J., delivered the judgment of the court.

On the authority of *Doe Anderson v. Todd* (notwithstanding the subsequent case of *Whicher v. Hume*, 16 Jurist, 391,) we are bound to consider the statute of Charitable Uses, 9 Geo. II., ch. 36, in force in Upper Canada. Assuming that the Refugee Society comes under the head of a charitable use, two questions arise: 1st. Is this conveyance to plaintiff from Mr. Dougall within the second section of this act, protecting “any purchase of any estate, &c., made really and *bona fide* for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion.”

In the language of the case cited, *Doe Preece v. Howells*, if for value, no enrolment was necessary, but other cases render this very doubtful, *Doe Williams v. Lloyd* (*Shelford* 119; Imperial Act, 9 Geo. IV., ch. 85.)

In the case before us, the defendant admitted the deed to plaintiffs on the usual notice, and at the trial did not raise any question as to the deed not being for value, but merely the general objection that it was void under the Mortmain Acts. It assumes to be for value, and most likely had such been disputed at the trial the plaintiffs could have readily proved it by calling Mr. Dougall the grantor, a gentleman admitted in argument to be alive and living in the vicinity. The deed being admitted before trial the plaintiffs naturally had not the subscribing witnesses in court

We do not think this is a case in which we should, on such evidence as is before us, and on the objections as taken, now say that the burden of proving value was on plaintiffs, and that without such proof, in addition to the evidence furnished by the deed itself, the plaintiffs are to be defeated by the Mortmain Acts, *Doe Cronk v. Smith* (7 U. C., 377). The more so as it is not even now seriously disputed that it was for value.

Apart from the question of value, it was admitted that the deed was made more than twelve months before death of grantor, and it appears to me duly registered under our registry laws, in the same month in which it was executed. It was a deed indented in presence of two witnesses, and taking effect in possession at once. It was of course not enrolled in "Her Majesty's High Court of Chancery."

If the case were to turn on the mere question of enrolment in Chancery, we think any court in this country would hesitate long before deciding against the plaintiffs, taking into consideration the object of enrolment under the act of Geo. II., to ensure publicity in a country where only two counties enjoyed a land registry office, and the language of our statute as to enrolments of deeds of bargain and sale, 1st. Wm. IV., ch. 1, sec. 47; 13 & 14 Vic., ch. 63, sec. 6, and other enactments hereinafter referred to.

It is also a very grave question whether the defendant admitted into possession by the plaintiffs, can be heard raising the objection in this case. The law is not very clearly laid down as to the right of a tenant or licensee of land to object to his landlord or licensor's title as void on a statutable objection. We are rightly told that there is no estoppel against an act of parliament. The language of Lord *Kenyon*, in *Cook v. Loxley* (5 Term Report 4), points out a distinction in answer to that principle, instancing the cases of usury, smuggling, &c., in which "the contracts themselves were founded in fraud." That, however, was an action, not of ejectment, but for use and occupation of glebe lands, and the defence was that the plaintiff's title was void by the act of Elizabeth, he being simonically presented. *Frogmorton v. Scott* (2 East. 467),



a lessor, a rector recovered in ejectment against his own lessee, on the words of the statute, 13 Eliz., ch 20, and 21 Hen. VIII., ch. 13, expressly avoiding such a lease as he had made, he being a non-resident and the lessee being a "spiritual person," which latter Lord *Ellenborough* seemed to consider as proved by the lease itself, in which the description of "Doctor in Divinity" is given to the lessee. *Doe Crisp v. Barber*, 2 T. R. 749, takes the same view on the same statute of Elizabeth, even where defendant was a mere wrongdoer. *Hodson v. Sharpe* (10 East, 350), was an action of covenant, and turned on the Bedford Level Act, as between landlord and tenant, and the estoppel held. *Doe Johnson v. Bantry* (3 A. & E. 188; 4 N. & M. 839), is a remarkable case, in which defendant having entered under plaintiff, was held estopped from denying his title, although it was proved, and the jury expressly found that plaintiff had let the defendant in, having himself just obtained possession fraudulently by a trick on another person. In that case *Coleridge, J.*, considers the estoppel works between licensor and licensee, as between landlord and tenant. A number of cases on the subject are collected in 1 Wm. S. 326, and in *Smith's L. C.* *Doe v. Oliver*, see also *Delaney v. Fox*, (29 L. T. R. 212, C. B. 11, June 1857.

In a late case, *Philpotts v. Philpotts* (10 C. B. 97). *C. J. Jervis* says: "It may be that a deed may be bad, so far as concerns the law of parliament, and yet as between the parties it may not be competent to either to set up its invalidity."

*Maule, J.*, in same case says: "The policy of the law always is not to make contracts void to a greater extent than the mischief to be remedied renders necessary." This latter is a very instructive case, and we incline to think that within its spirit the defendants here would hardly be heard to assert that the title under which the plaintiffs claim, under whom he entered, was a void title, either by act of parliament or otherwise.

The Statutes of Mortmain are held to be in force in this province, principally on the ground that in some of the

enactments of the local legislature granting privileges inconsistent with those acts, it is stated that such privileges are granted notwithstanding the statutes relating to mortmain. If these statutes had been *expressly* introduced, it is probable some provision would at the same time have been made as a substitute for the enrolment in Chancery, required by the English statute of Geo. II., to give publicity to the fact of a conveyance coming within the act having been made.

Shortly after the passing of the Statute of Uses in England (27 Henry VIII., ch. 10), the facility with which *secret* conveyances could be made by deeds of bargain and sale, began to attract the attention of the legislature there, and the remedy they devised for the purpose of averting the evils likely to arise therefrom, was to connect with this new conveyance a new ceremony calculated to ensure publicity, and to operate as a permanent memorial of the transaction. It was accordingly enacted by statute 27 Hen. VIII., ch. 16, called the Statute of Enrolments, that no bargain and sale shall enure to pass a freehold, unless the same be by indenture enrolled within six months after its date in one of the courts of Westminster Hall, or with the *custos rotuorum* of the county (Stephen's Commentaries, 507). At a very early period in the history of Upper Canada, the necessity of providing a substitute for enrolments became apparent to the legislature. By provincial statute, 37 Geo. III., ch. 8, entitled "an act to supply the want of enrolment of deeds of bargain and sale," (after reciting that deeds of bargain and sale are not valid in law for want of enrolment in a court of law), it is enacted, that wherever any lands have been sold, or shall hereafter be sold under deed of bargain and sale, and such deed of bargain and sale hath been or shall hereafter be duly enregistered in the register office of the county in which the lands are situate, agreeably to the provisions of the provincial statute, 35 Geo. III., ch. 5, the same shall be and is hereby declared to be a good and valid conveyance in law.

By provincial statute, 4 Wm. IV., ch. 1, sec. 47, it is provided, that after the passing of that act a deed of bargain

and sale of land in this province shall not be held to require enrolment, or to *require registration to supply the place of enrolment*, for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold, adding a proviso to save the operation of the registry laws as to prior registered conveyances.

The provincial statute 9 Vic., ch. 34, sec. 14, enacts, that whenever any lands have been, or shall hereafter be sold under deed of bargain and sale, and such deed hath been only registered, or shall hereafter be recorded in the registry office of the county where such lands lie, the same shall be, and is hereby declared to be *as good and valid a conveyance in law, as if the same had been regularly enrolled*.

This last section is repealed by statute 13 & 14 Vic., ch. 63. sec. 6, on the ground that it might render doubtful the meaning of the 47th sec. of 4 Wm. IV., ch. 1, as to its being compulsory to register a deed of bargain and sale to make it valid.

By various other acts of the Provincial Legislature, authorising lands to be held for religious purposes, provision is made as to registration of deeds in the county registrar's office.

3 Vic., ch. 74, Church of England Temporalities Act, sec. 16, requires that in order to the validity of such deeds they must be made and executed six months at least before the death of the person conveying the same, and shall be registered not later than six months after his decease.

9 Geo. IV., ch. 2, enabling trustees to hold land for a site for a church, burying ground, &c., for the religious bodies therein named; sec. 3 provided that such trustees shall within twelve months after the execution of such deed, cause the same to be registered in the office of the registrar of the county where the land lies.

3 Vic., ch. 73, extends to the religious societies mentioned in 9 Geo. IV., ch. 2, the power to hold lands in manner therein specified for the support of public worship and the propagation of Christian knowledge, any thing in the Statutes of Mortmain to the contrary.

8 Vic., ch. 15, extends the provision of these two acts to other bodies of Christians, and authorises the conveyance of land to trustees, any thing in the Statutes of Mortmain to the contrary. Sec. 2, trustees *within twelve months* after execution of deed or conveyance, to cause the same to be registered in the office of the registrar of the county in which the land is situate.

12 Vic., ch. 91, all deeds for these purposes, if *registered* within twelve months after passing of that act, to be as *effectual* as if registered within the time limited by previous acts, except as to prior registered deeds or instruments.

16 Vic., ch. 126, contains similar provisions for extending the time of registration for twelve months after passing of the act.

The language used in the statutes of Upper Canada, as to substituting registration for enrolment, is broad enough to cover deeds of a class similar to that under discussion, although the immediate object of these enactments seems to have been to substitute registration for enrolment in relation to deeds of bargain and sale as such, without considering the objects for which the deeds were made.

The fact that enrolment of deeds never has prevailed to any extent in this province, the absence of the necessary machinery to carry it out, the uniform course of legislation on the subject, and the reason and object of enrolment itself, all convince us that the proper and correct decision to arrive at in relation to this subject is, that the legislature when they recognised the existence of the Statutes of Mortmain and other similar statutes in this province, intended that registration in the county registry office should be substituted for enrolment in the High Court of Chancery, where such enrolment is required by the English statutes.

The conveyance to the plaintiffs having been for a valuable consideration actually paid in good faith, having been registered (*enrolled*), within six calendar months next after the execution thereof, and being to take effect in possession, and the grantor being still alive, we are of opinion that the same is valid under the statute 9 Geo. II., ch. 36, and our judgment therefore is for the plaintiffs.

Postea to plaintiffs.



## McLEOD V. DARCH ET AL.

*Replevin—Surrender—Satisfaction.*

That defendant leased certain premises to one F. from whom he took a note in payment of arrears of rent. F. let the plaintiff into possession of the premises, and the plaintiff made certain payments to defendant on account of rent, for which defendants gave receipts as for premises leased to F. On pleas of *rien en arriere* from Fraser, and *non tenuit*. Held—1. That plaintiff could not insist upon the taking of the note as a discharge of the rent due from F. 2. That there had been no surrender of the term of F. by operation of law.

REPLEVIN, for taking certain goods and chattels of plaintiff's on 4th November, 1856, in the city of London, U. C. Defendant says that one Andrew Fraser for six months before the 15th of June, 1856, and from thence until the time when, &c., held the building known as the fourth store numbering from the east of the Darch Block, in the said city of London, in which, &c., as tenant to defendant by virtue of a demise, at £200 per annum, rent payable quarterly on 15th of March, September, June, and December in equal proportions every year, and because £75 balance of the rent aforesaid for six months ending on 15th of June aforesaid, and from thence until and at the time when, &c., was due and in arrear from the said Fraser. Defendant well avows the taking of the said goods and chattels in the said building in which, &c., and justifies for distress for said balance of rent due as aforesaid; the other defendant makes cognisance, and justifies the taking as the bailiff of Darch.

Plaintiff as to the avowry and cognisance of both defendants says:—

1st. That no part of the alleged rent was, or is, in arrear from the said *Fraser* to Darch.

2nd. That Andrew Fraser did not hold and enjoy the said building in which, &c., as tenant thereof to the said Darch under the alleged demise in the avowry mentioned *modo et forma* as Darch hath in that behalf alleged.

The case was tried before *Richards J.*, at the last London assizes. It appeared at the trial, that by an indenture of lease dated 15th Dec., 1855, between defendant and Fraser, that the premises were leased to the latter for five years at £200 per annum, payable quarterly, as mentioned,

with usual covenants to pay rent, &c. On the 15th of April Fraser owed Darch on account of rent £50, and not being able to pay, gave him for the rent which was due, and to pay half the next quarter's rent, his note for £75, payable to defendant's order at three months. This note defendant passed away, but was compelled to take up. On the 14th of June, Fraser having got into difficulties, plaintiff took the stock and premises from him, and went into possession with defendant's knowledge. Plaintiff continued to occupy the place till 13th of December, 1856. On 2nd October plaintiff called the defendant in to pay the rent that was due. Defendant asked if he would pay the note for £75, he said he did not think he had any right, as that rent was contracted before he came into the store, but he would pay the rent he considered he owed himself. Plaintiff then put the note into his pocket, saying he supposed he would have to lose it. Plaintiff then paid him £42 18s. 4d. in cash—he had previously paid him in (two sums of £5 and £10 each) cash £15—which, with an account Fraser had against Darch of £17 1s. 8d., made £75, and he gave McLeod a receipt for the £42 18s. 4d., in full for rent to 15th September, 1856, of store leased by Fraser. Verdict was entered for plaintiff, with leave to defendants to move to enter a verdict for them, if the court should be of opinion that defendants had a right to distrain on the goods on the premises which had been assigned to McLeod for the £75 due on the rent from Fraser, Darch having taken the £75 note from Fraser, and having given the receipt referred to. It further appeared that Fraser on the 12th of January, 1857, (and after the distress), made a formal surrender of the lease to Darch under seal. One of plaintiff's witnesses stated he had heard defendant say he was satisfied with plaintiff as his tenant; that he was frequently in the place from June to December; that he had said he could get no money from Fraser, but McLeod (plaintiff) was *first rate*.

In Easter term, *J. Wilson*, Q. C., pursuant to leave reserved, moved to set aside verdict for plaintiff, and to enter verdict for defendant on the ground that there was rent due to the defendant at the time of making the distress.

*Patterson* shewed cause, and contended that the taking of the note and giving the receipt clearly shewed an acceptance of the note in satisfaction of the rent, and that all the rent was paid to 5th of September. He further argued that Darch had received rent from McLeod, and acknowledged him as his tenant, and that therefore he had so dealt with the premises as to work a surrender of the term created by the lease to Fraser, and as Fraser was not actually in possession defendant could not distrain. He referred to *Davis v. Gyde*, 2 Ad. and Ellis 623, and *Reeve v. Bird*, 1 C. M. & R. 31.

*J. Wilson*, Q. C., contra. *Davis v. Gyde* is a strong authority for defendant, for it was there held it was necessary to plead that the note was taken in satisfaction of the rent, or at all events it should be shewn it was agreed to waive the right to distrain, whilst here all that plaintiff says in his pleadings is that the rent was not in arrear from Fraser: the rent certainly was never *paid*, and if discharged in any way it was by the taking of the note. As to plaintiff being tenant, he never would acknowledge tenancy. The receipt itself, although dated as late as October, after McLeod had occupied the place nearly four months, still mentions rent of store leased by John Fraser—not held by John McLeod. He referred to *Wheeler v. Branscomb*, 5 Q. B. 373; as shewing that plaintiff should have pleaded specially, if it could have been any defence, and that what took place was no waiver of the tenancy of Fraser under *non tenuit*. He also referred to *Drake v. Mitchell*, 3 East 251, which shews that giving a bill of exchange is no satisfaction for a bond, unless averred as accepted in satisfaction.

RICHARDS, J., delivered the judgment of the court.

*Davis v. Gyde* seems a strong authority in favour of the defendant. The plaintiff does not plead to the avowry that a promissory note was taken in satisfaction of the rent, if that would have been a good answer; but merely denies that the rent was in arrear from Fraser. The rent has never been *paid*, and if it is not now in arrear it is only because something, to wit, the note has been taken for it, and this has

not been pleaded, nor if it had been, is it so clear that under the facts shewn it would be taken in law to have been a satisfaction. Then under *non tenuit* there is nothing to shew that at the time the distress was made McLeod was defendant's tenant, the receipt drawn up by McLeod's clerk merely acknowledges the receipt of the money from McLeod on the rent of the shop leased to Fraser. That surely could not create a new tenancy, as by operation of law. There must be such a dealing with the premises to create a new tenancy by operation of law, as would be inconsistent with the existence of the original lease and term thereby created. In this case the parties did not so view the matter, for an actual surrender of the old lease by Fraser was taken shortly after. See 3 Tyr 201, *Graham v. Whichelo*. On the whole we think the rule to set aside the verdict for plaintiff and enter a verdict for defendant should be made absolute. Whether to defendant under the plea of "*rien en arriere*" a receipt of a note expressly in satisfaction of rent could be given in evidence, we do not think it necessary to decide; for under the evidence in this case we think the plaintiff must fail, even if the facts shewn were admissible as evidence under that plea. (a)

*Per Cur.*—Rule absolute.

### LUNDY v. DOVEY.

*Tenancy at will—Purchaser—Demand of possession.*

The defendant in ejectment had been let into possession under a contract to purchase payable by instalments, with a stipulation for forfeiture if payment not made on a particular day, and the vendor had subsequent to such day received payment on account.

*Held*, the defendant was tenant at will and not by sufferance, and that a demand of possession was necessary.

This was an action of ejectment brought to recover possession of the north half of lot No. 19 in the 8th concession of the township of Emily, in the county of Victoria.

The defendant gives notice that he defends as a tenant of plaintiff for a term unexpired at the commencement of the suit.

(a) *Badnall v. Samuel*, 5 Price, 527; *Thomas v. Cook*, 2 B. & Al. 119; *Mathews v. Sawell*, 8 Taunt. 270.



The case was taken down to trial before Mr. Justice *Hagarty*, at the last Peterborough assizes.

On the 24th of October, 1853, plaintiff gave defendant a receipt dated that day, in which he acknowledges to have received from him £3 15s. to apply on account of land payment for Dawson's land sold for \$600; the first payment to be made on the 1st of January, 1854, "and then for to pay the balance of one hundred dollars. This is for to be forfeited if the first payment is not made then." On the same day he directed a written memorandum to John Carroll, Emily, signed by himself, in which he says, "I have sold the farm that I rent you, known as the Dawson Farm, to John Dovey: you will please give him possession of it according to agreement." There was also a receipt dated 14th of March, 1854, given by defendant, *per pro.* John S. Lundy, acknowledging the receipt of £12 10s. on account of land payment. The defendant called the plaintiff, who stated the payments were to be yearly of \$100 each, with interest; that in addition to the sums mentioned in the receipts he had received five or six thousand shingles in the winter of 1855 and 1856; they were on account of the instalments. That he went to defendant several times and applied to him for payment; he was not willing to pay; that defendant was in possession under the sale to him; that he had been in arrear since, and that all he has paid and the shingles would not amount to the instalment.

It was objected that defendant was entitled to demand of possession. The learned judge inclined to that opinion. It was finally consented that a verdict should be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit.

In Easter Term last *W. H. Weller* moved to enter a nonsuit pursuant to leave reserved. *D. B. Read* shewed cause, and contended that as defendant entered as a purchaser agreeing to pay by a specific time, having failed to pay, he was only then a tenant at sufferance, and was not entitled to a demand of possession. He further contended that under the notice of defence given he could not set up the want of demand of possession, he in fact claiming by his

notice that he had a term in the premises which had not then expired ; that if the proper notice had been given, perhaps plaintiff would have discontinued and made the proper demand, and have brought another action. He referred to *Doe Philpotts v. Crouch*, 5 U. C. 453 ; *Stodders v. Trotter* 1 U. C. 310 ; *Doe Turner v. Bennett*, 9 M. & W. 643.

*Weller* contra, contended that where a party was let into possession as a purchaser he could not be considered a trespasser until the tenancy at will thereby created was terminated. He referred to *Right dem. Lewis v. Beard*, 13 East. 210. He also contended, that the notice was sufficient, at all events the point now contended for was not raised at *nisi prius*, and defendant had leave to move on the ground that a demand of possession was necessary. If the objection now urged had been taken at the trial the learned judge might have allowed an amendment if he thought the plaintiff would not have been prejudiced thereby.

RICHARDS, J., delivered the judgment of the court.

As a general rule, where a party is let into possession of land as a purchaser he become a tenant at will, and cannot be turned out of possession without a previous demand. But many of the cases in our own courts go to the extent that where a party enters agreeing to pay by a certain day and makes default, then he may be ejected as having forfeited his right. But I take it for granted that if the owner recognises the possession as lawful after such a forfeiture, and it is shewn that the party remains in possession with his assent, that the previous forfeiture is waived. From the evidence it appears that in March, 1854, plaintiff received £12 10s. on account of this purchase. He recognised the agreement to purchase at that time as a subsisting one by receipt of the money, although it had been *forfeited* by non-payment of the £25 in January previous. We must, I think, assume that on receipt of that payment defendant was on the place with the assent or will of plaintiff, and that any forfeiture previous to that had been waived.—*Barber v. Allen* (6 U. C. C. P. 329.) For the like reason we must assume defendant was there in the winter of 1855–6 with the will of the plaintiff, when

here received shingles on account of this agreement. Now have we any evidence to shew that that will was ever terminated before this action was brought? I see none. If the will was never terminated the action will not lie. Where parties after the expiration of the time of payment either in a mortgage or an agreement, or after a forfeiture in a lease, remain upon premises, without being recognized as lawfully in possession: they are tenants at sufferance, and are not entitled to demand of possession. Their original entry was lawful, but after the default they are in fact there only on sufferance, and therefore are not entitled to any notice to quit or demand of possession, for want of recognition of there being there with the express assent of the owner. But here we think what was done by the plaintiff was a declaration of his will that defendant was lawfully on the premises after the default or forfeiture, and that plaintiff was not at liberty to turn him off without a demand of possession.

We do not consider that our decision conflicts with any of the cases referred to. As to the other objection we do not notice it, as it was not taken at *nisi prius*.

*Per Cur.*—Rule absolute to enter non-suit.

## STAFFORD V. TRUEMAN.

### *Dower—Exchange—Evidence.*

Where in action of dower the defence rested upon an alleged exchange by the husband for other lands out of which the widow had been satisfied her dower, and no deeds were produced, and the only evidence for the defence consisted of parol statements that the husband had "traded" certain lands.

*Held*, there was not evidence to warrant a jury in finding for the defendant.

DOWER for the east half of lot No. 5, in the first concession of Chinguacousy: suggestion, that husband died seized.

*Plea*—1st. Denying seism of husband.

2nd. Exchange by her husband with one Bowbier of this land for certain land in the township of Hullett, out of which land so received by her husband in exchange demandant was endowed.

3rd. Satisfaction of demandant's claim of dower by other lands given to her by the heir and accepted in discharge.

4th. Sets up an agreement to exchange the land for land in Hullett, and a conveyance to Stafford in pursuance of it of the land in Hullett, and that after the death of her husband demandant got her dower out of the land in Hullett.

The case was taken down for trial before Sir *J. B. Robinson*, C. J., at the last Toronto assizes. It appeared that demandant's husband died seized about eight years ago.

Robert Kelly stated that the husband of demandant told witness he had *traded* his land in Chinguacousy with Bowbier for land in Hullett, (this was objected to, but received subject to the objection,) after his death witness conversed with demandant about the lands in Hullett; she spoke of her claim to dower in these lands, this was about a year after she became a widow; thinks it was 200 acres in Hullett that Stafford got: Stafford left no will: Styles was his eldest son: Demandant told witness that Styles had given to his brothers William and Frederick, fifty acres each; and she told witness that Frederick her son had given her \$100 for her dower on his fifty acres, and that William had given her a yoke of cattle for her dower on his fifty: she complained of Styles for using her badly: that if he kept the fifty acres she was living on from her, she would claim her dower in it: that Styles had mortgaged it to one Crabb and she had taken up the mortgage: the fifty acres she lives on is worth \$1000, the mortgage she paid to Crabb was about \$100. She released her dower in the deed to Styles (no deeds produced): don't know if she ever spoke to witness of her dower in the Chinguacousy lands: the Hullett lands were got from the Canada Company: believes they made a deed to Stafford when he paid for it: Bowbier had made over his right to Stafford; as witness understood, Bowbier got a deed from the Canada Company and then conveyed to Stafford.

Jeremiah Whitely proved—that Stafford lived in Hullett sixteen years: demandant lived on the land: occupies fifty acres: lives in the house her husband had lived in; four years or more after her husband's death, she told witness she had got a yoke of steers from her son William for her right in



the fifty acres he got: that she had got notes for Frederick's fifty acres. About a year after witness saw her with her daughter Sarah: she had been at Chinguacousy: she said to Sarah her uncle Montgomery wanted her to look after her rights in Chinguacousy: her daughter told her she should do nothing of that kind, for it would not be fair: demankant said she would not, for that she had got all she wanted: witness did not ask what she had received.

Isabella Whitely, wife of last witness, heard the conversation just related: demandant said to Sarah, your uncle Montgomery wanted me to look after the property in Chinguacousy: her daughter said no, that she should not do so: demandant said she would not, for she had got all off of it she desired to have.

Margaret Murphy proved—that demandant told her William had given her the yoke of oxen for his fifty acres: that Frederick had given her nothing, but she meant to make him give her something: she was then living on the land in Hullett: she did not explain how she got the portion she was living on.

It was clearly shewn she claimed dower on the Hullett land, and she stated that Styles had given William and Frederick, and her daughter, fifty acres each, and that she had got the old place, but did not say how much land.

Plaintiff's counsel objected there was nothing but conversations about exchange; and called her two sons to prove that she had not taken dower for the land in Hullett: there were 250 acres in the lot in Hullett.

The learned Chief Justice told the jury as to the *first* issue, that the seisin of demandant's husband was admitted.

As to the *second*, he could not say there was any legal evidence of the giving and taking lands *in exchange* between Bowbier and Stafford as pleaded: if that were shewn there would be a question for the jury on the point that she did not receive dower in the lands in Hullett, or rather, whether she did not receive satisfaction and compensation for that right. He could not say that this plea was proved, and should so rule.

The 3rd plea applies to land received from the heir in

compensation for her dower in the Hullett land. Tenants urge that the heir agreed to give up equity of redemption in the fifty acres mortgaged to Crabb, and to let that go to her absolutely on her paying of the mortgage to Crabb with the \$100 that Frederick gave her. As to this the jury were told that this was not proved as the law requires.

The learned Chief Justice stated to the jury that he could not say that that part of the plea which relates to the exchange of property, title, &c., between Bowbier and Stafford was proved by legal evidence, though there was perhaps evidence to go to the jury on the other point of the plea, the election to take dower out of the Hullett lands, and her receiving compensation for it.

In conclusion the jury were told that plaintiff was entitled to a verdict, whatever might be the real facts of the case. On this charge the jury found for defendants.

*Jones, J. R.*, in Easter Term, obtained a rule to set aside the verdict.

*Wilson, A.*, Q. C., during the term shewed cause, and contended that the admissions of parties to a suit, or those under whom they claim of a conveyance or exchange of land, or other fact that can be proved by a deed or other written instrument was evidence to go to a jury; although the opposite party might exclude such evidence by producing the deed. He contended it was some evidence, although perhaps not the best. He referred to Taylor on Evidence, 2nd edition, page 355, and the authorities there referred to, and particularly to the case of *Slatterie v. Pooley*, 6 M. & W. 664; which, although questioned by Mr. Taylor and disapproved of by the courts in Ireland, has yet been considered as good law in England. He also referred to the 4th edition of Starkie on Evidence, page 648; *Townsend v. Smith*, 12 U. C. Q. B., 555; he also urged that the admissions of demandant's husband previous to his death, and her admissions since, shewed that the Chinguacousy land was "exchanged" for the Hullett land, and the evidence shewed she had received satisfaction for her dower in the Hullett land.

*Jones, contra*, contended that an "exchange" of land was of a peculiar character: the word itself in its proper

application to land was more than usually *technical*, and the legal effect upon the lands themselves so much depending on the fact of whether the word "exchange" was used in the conveyance, that the deed itself ought to be produced. He contended that *Townsend v. Smith* was an authority in his favour on that point, and that the whole current of decisions which were there referred to and commented on shewed that it would be quite unsafe to rely on any thing but the deed itself. But admitting that the parol evidence could be received, which he denied, the only evidence on this point was the statement said to have been made by demandant's husband that he and Bowbier had *traded* lands. That this was no admission of the contents of the deeds, or that such trading had resulted in that peculiar kind of transfer technically known as an "exchange" of lands. Taylor on Evidence, as already quoted, *Williams v. Morgan*, 15 Q. B. 782; Parke on Dower, 264-5-8; 2 Sh. Touch. ch. 14. He also contended that there was no legal evidence of assignment or acceptance of dower in the Hullett lands; that the dower, if assigned, should be by metes and bounds, and with such certainty that it could be properly described, if it were necessary to bring ejectment. He referred to Parke on Dower, 264, 5, 268; Crabb on Real Property, 1141, 1146, 1147, and 1145.

RICHARDS, J., delivered the judgment of the court.

Without questioning the authority of *Slatterie v. Pooley*, and the cases where it has been recognised, we do not well see how it can be applied in the case before us. The admissions referred to in the evidence are not the statements of the demandant or of her husband as to the contents or effect of deeds given or received concerning the land, out of which the dower is claimed, but merely a statement by the husband that he and Bowbier had *traded* lands. Even if they had *traded*, and the one lot had been given for the other, yet if the technical words to denote an exchange had not been in the deeds, it would not be considered an exchange in law. We think the case of *Townsend v. Smith* fully sustains this position. There was no evidence at the trial of any admission or fact from which it could be properly inferred that

the deed which passed, if deeds did pass, between Bowbier and demandant's husband were deeds of exchange. Then if the admissions did not go to that extent, they could not warrant a verdict for the defendant. Considering the extent to which the authority of *Slatterie v. Pooley* has been questioned, we think we would be carrying its doctrines to a much greater length than was ever intended, if we held they extended so far as to warrant the verdict in this cause. On the whole we quite agree with the learned Chief Justice, before whom the cause was tried, that there was not evidence to warrant the jury in finding for the plaintiff on the several issues, and we therefore think the rule for a new trial should be made absolute.

Rule absolute.

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#### BATES V. CHISHOLM.

##### *Affidavits—Evidence.*

On a question of whether a note of £50 and a charge for a similar amount were the same, the jury having found for the plaintiffs; on an application for a new trial being made upon affidavits, and the defendant not swearing that he could produce new evidence—Rule discharged.

This action was tried at the last Hamilton assizes, before *Burns, J.* The contest was, whether a note for £50, and a charge of a similar amount in cash on an account, were in fact identical. The jury found for the plaintiff. The defendant states in his affidavit, on which the new trial was moved for, that he never had two sums of £50 from the plaintiff, and referred to certain items as credited him in plaintiff's account; and further states that a witness, whom he names, could give important evidence for him which he did not know of before. He does not state what the evidence is, nor produce the affidavit of the witness. We granted the rule principally on the defendant's strong denial of ever having received the two sums of £50 each, and the apparent fact that the credits were inconsistent with the claim. On shewing cause, *Freeman, Q.C.*, filed the affidavit of the plaintiff, which meets the statement of defendant, and explains that the credits were entered in 1853, instead of 1854, by a mistake of his attorney, which gets over that difficulty.



RICHARDS, J., delivered the judgment of the court.

We do not see how we can now grant a new trial. The jury have found against the defendant, and he has had an opportunity to appeal to the conscience of the plaintiff, who distinctly swears that he did let the defendant have the two sums of £50, which was the real contest at the trial. We must therefore discharge the rule.

Rule discharged.

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TULLOCH v. WELLS.

*Demurrer—Condition precedent.*

The declaration claimed damages for the breach of contract between the plaintiff and defendant for sawing timber, containing an agreement by the defendant to supply the plaintiff with such a portion of the price as would enable the plaintiff to carry out the contract, but did not aver any demand on, or refusal by the defendant to supply such moneys.

*Held*, bad on demurrer.

The declaration contained the following count:—for that whereas the plaintiff agreed with the defendant to cut and manufacture of the pine trees of the defendant, then growing and being upon certain closes of the defendant, in the township of Innisfil, in the county of Simcoe, eight thousand pieces of pine timber, to be equal in quantity to eight thousand standard saw-logs, and to deliver the said timber, when so cut and manufactured, on the banks of Kempenfelt Bay, on lake Simcoe, near the mill of the defendants, in the said township of Innisfil, at and for the price and sum of twelve shillings and six pence for each and every thousand feet of inch measure in the said timber so to be delivered; “and the defendants agreed to supply the plaintiff with such portion or part of the said twelve shillings and six pence so to be paid for each and every thousand feet of inch measure as would enable the plaintiff to carry on and fulfil the said agreement on his part.” And the plaintiff saith, that he afterwards commenced to cut and manufacture, of the said pine trees of the defendant, the said peices of timber, and did cut and manufacture thereof two thousand six hundred pieces of timber, in pursuance of the said agreement, and delivered thereof, at the said bank on Kempenfelt Bay, as aforesaid, two thousand two hundred pieces of timber of that which he had cut and manufactured as afore-

said. And the plaintiff avers that he was *ready and willing and offered* to complete the said agreement on his part, *and to complete the cutting* and manufacture of the said eight thousand pieces of timber, and to deliver the same, as aforesaid; but the plaintiff saith, that the defendant did not nor would supply the plaintiff with a sufficient portion or any portion of the said twelve shillings and six pence so to be paid by him to enable him, the plaintiff, to cut and manufacture and complete his said contract, as by the terms thereof they were bound to do; and the plaintiff saith, that he was therefore unable to complete the cutting and manufacturing of the said pieces of timber; by reason *whereof*, and of the delivery of the said two thousand two hundred pieces of timber, there is now due and owing from the defendant to the plaintiff the sum of five hundred pounds. And the plaintiff hath been deprived of the gains and profits which he would have derived and acquired from the completing the said contract on his part. And the plaintiff is and hath been otherwise much injured and damnified.

To this the defendant demurred, on the ground that the plaintiff shewed therein neither a completion of the contract by him, nor any sufficient excuse for the non-completion thereof, and improperly treated the defendant's undertaking to pay a portion of the price, &c., as a condition precedent to the plaintiff's performance of the said contract.

*Eccles*, for demurrer, cited *Barron v. McKay*, 5 U. C. 24.  
*McMichael* contra.

HAGARTY, J., delivered the judgment of the court.

The point stated by defendant as his objection to this count is substantially that plaintiff treats defendant's undertaking to pay a portion of the price as a condition precedent to the performance of his contract. On the argument the point pressed on us was the want of any averment of the plaintiff's requiring any money to enable him to complete his contract, or any notice to, or demand thereof on, the defendant. We have felt some hesitation in forming our judgment as to the sufficiency of the count demurred to, but have come to the conclusion that the defendant is entitled to

succeed on his objections. All that the plaintiff states as to the contract may be quite true, and that he was really in want of money to enable him to complete it; and yet the defendant may never have been made aware thereof, and the writ issued in this suit may have been the first notice to him of any difficulty on the plaintiff's part in completing it. We think that on such a bargain the plaintiff should shew that he reasonably required some money to enable him to complete the work: that he required defendant to advance him such an amount, being a reasonable sum, and that the defendant refused or omitted to make the required advances. After waiting a reasonable time, the plaintiff could throw up the bargain, and sue for work done and loss of prospective profits. Nothing of the kind is here averred. It was, we think, for the plaintiff to require a reasonable sum from the defendant, not for the defendant in the first instance, without being asked or told how much the plaintiff required, to tender, at his risk, sufficient money to the plaintiff. On the count, as it stands, it may be quite true that the defendant has made no default. We think there must be

Judgment for demurrer.

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WADDLE (APPELLANT) v. McINTOSH (RESPONDENT).

*Money paid—When recoverable.*

The master of the appellant's vessel, on the transhipment of a cargo of wheat, on its way from Owen Sound to Quebec, into the respondent's vessels, gave a receipt to the respondent for the lake freight, stating that the appellant's vessel and her owner were thereby held responsible for the wheat, weighing 5934 bushels, at Quebec. On arrival at Quebec the cargo was found 68 bushels short, and the respondent allowed the value of that quantity to the consignee out of the river freight.

*Held*, under the circumstances, that the respondent was not entitled to recover the amount deducted as for money paid for the appellant.

APPEAL from the judgment of the County Court of the united counties of Frontenac, Lennox, and Addington.

The action is one on the common counts, for money paid, and money had and received, account stated, &c. Plea—Non-assumpsit.

The plaintiff, in the court below, is a forwarder from Kingston to Montreal; and the defendant is a ship-owner.

In 1855, probably in the forepart of June, John Lenfesty & Co., of Quebec, shipped on board the defendant's vessel the "Mermaid," a quantity of wheat at Owen Sound. This wheat was intended to be sent forward to Quebec, and was consigned to Lenfesty & Co. there. About the 19th of June the "Mermaid" arrived at Kingston. The wheat was unladen and placed in a store there. The master of the "Mermaid" on that day gave a receipt to the plaintiff for £297 1s. 6d. for the lake freight on 5934 bushels of wheat, at 1s. per bushel, ex schooner "Mermaid," and 7s. 6d. for two bales of wool, the whole being consigned to John Lanfesty, Quebec, the wheat being already insured through: and the vessel, the "Mermaid," and her owners are hereby held responsible for the wheat, weighing 5934 bushels, at Quebec.

The wheat was shipped at Kingston for Quebec on board the barges "Quebec" and "Doon," and it arrived there on the 28th of June. On its being carefully weighed, it was found to contain 5876 bushels. The wheat was kept by the plaintiff's agent, at Quebec, until the 12th of July, as the consignees would not pay the freight. On that day, after deducting the value of 58 bushels, at 11s. per bushel, £31 18., Lenfesty paid the freight.

He made out an account in relation to the wheat, charging Mr. JOHN LAIRD, agent D. McINTOSH,

To JOHN LENFESTY, Dr.:

For short deducted on wheat transhipped into barges "Doon" and "Quebec" from schooner "Mermaid," per bill of lading, shipped at port Owen Sound, wheat short on B.L.,

Per B.L..... 5,934

Delivered only... 5,876

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58 at 11s.....	£31 18 0
Men measuring.....	3s. 9d.
Scales .....	15s.      0 18 9

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£32 16 9

On the 20th July, 1855, in reply to a letter of the plaintiff, dated the 18th of that month covering an account of £32 4s. 6d. for the deficiency on this wheat, plaintiff says he shall not make himself liable in any way for the stated deficiency—*First*, Because Mr. Lenfesty, at Owen Sound, pretended



to weigh the wheat with a dry-goods box, strung on an iron bar, without marks or figures on it, and had some stones, gravel, old nails, &c., in a shot-bag; "and," to use the words of the letter, "I told him it was an odd-looking apparatus: that I knew nothing about his method of weighing with such a primitive-looking concern: that he might weigh for his own satisfaction, although I could only undertake to deliver what he gave me. He said this was all right, and that it was all he expected; but he said he knew it would run over the quantity stated, and in such case I promised he should have every pound there was. The transshipment at Kingston I understood was at Mr. Lenfesty's own request, and if my crew will swear they delivered there all they received at Owen Sound, I consider I am released, because no one in common reason can pretend to hold me liable for the wheat whilst in transitu between Kingston and Quebec; and if your men delivered all they received in Kingston then one or the other of the Lenfesty's, either at Owen Sound or Quebec, is dodging. But I imagine Mr. Lenfesty, upon hearing the particulars, will refund the money, because if you delivered all you got from the "Mermaid," the wheat never was shipped."

At the trial a nonsuit was moved for, on the ground that the master of the "Mermaid" had no authority in law to enter into the writing or agreement produced, no such power being vested in the master of a vessel without special authority. *Second*, The action cannot be maintained on the common counts, a special agreement having been produced. *Third*, That the action should be in the name of the consignee, and not of the present plaintiff. Verdict for plaintiff, £32 2s. 6d., subject to the points.

In March Term, *Parke* obtained a rule to enter a nonsuit, on points reserved, or for a new trial, the verdict being contrary to law and evidence, and for misdirection, which was subsequently discharged. This appeal is from the judgment in the court below discharging that rule.

*Note.*—From the judgment of the court below, it appears that there was no bill of lading produced, but Lenfesty was the consignor as well as the consignee.

In Easter Term, *Richards* for appellant, cited *Shields v. Davis*, 6 Taunt. 65.

*R. Vankoughnet* for respondent, cited *Brown v. Hodgson*, 4 Taunt. 189.

HAGARTY, J., delivered the judgment of the court.

We are of opinion that the appeal must be allowed, on the ground that we cannot see any evidence to support the plaintiff's claim for money paid for defendant.

Assuming that defendant's captain had a right to enter into the guarantee as to the weight of the wheat at Quebec, we see nothing in the evidence to shew how plaintiff incurred any responsibility to Lenfesty, or any one else, except for any breach of duty he might commit as a carrier while it was in his custody. No bill of lading, or other document in any way binding the plaintiff, is proved or alluded to. He earned his freight, on whatever he carried, and because consignee refused to pay it unless plaintiff allowed for the alleged deficiency, and the latter, without any communication with or authority from the defendant, chose to pay or allow the sum claimed, I cannot see how the law can raise any implied promise or request in favour of plaintiff. Had the action been brought on the special agreement made with defendant through his captain at Kingston, it would probably have appeared what, if any, consideration there was to support the undertaking therein, and whether plaintiff *in faith* thereof undertakes any thing beyond his mere carrier's duty as to the quantity of wheat on board of or received from the "Mermaid."

We therefore allow the appeal, and direct that the rule below to enter a nonsuit be absolute.

On this see *Glass v. Gray* (29 Law Times, 162 Ex.)

#### STUBBS v. MARTINDALE.

*Covenant for good title—Measure of damages—Costs.*

In an action by a purchaser, who had been ejected, against his vendor upon his covenant for a good title—*Held*, that the plaintiff might recover as damages the costs of the ejectment brought against him, which he had defended (even though he had not actually paid them), in addition to the purchase money and interest.

The cause was tried at the last spring assizes, before Sir

*J. B. Robinson*, Chief Justice of Upper Canada, and a verdict was rendered for the plaintiff for £107 17s.

In Easter term *Patterson*, pursuant to leave reserved, moved to increase the verdict by £25, the costs of an ejectment suit brought against him to recover possession of the land sold by defendant to plaintiff, and for a breach of the covenant, to the title to which land this action was brought. The learned Chief Justice considered that the purchase money and interest was the true measure of damages for the breach of the covenant for good title when no fraud was shewn. He, however, gave leave to the plaintiff to move to increase the verdict by £25, the costs of the action brought against him.

*Eccles*, Q. C., shewed cause against the rule, contending that the ruling of the Chief Justice was correct.

*Patterson*, in support of the rule, contended that although no notice was given to the defendant in this action of the former suit, and although the costs had not been paid, that plaintiff had still the right to recover these costs. He referred to *Smith v. Compton*, 3 B. & Ad. 407, and *Collens v. Wright et al.*, reported in 27 Law Times, 267 Q. B., decided on 17th January last. He also referred to *Clark v. Robertson*, 8 U. C. Q. B. 370.

RICHARDS, J., delivered the judgment of the court.

The case of *Smith v. Compton* (3 B. & A.) seems to be an authority that a plaintiff may recover costs of suit, in addition to the sum paid, to compromise a superior title under a covenant for good title, whether notice was given of the action or not.

In *Rawle on Covenants for Title*, at page 122, it is laid down that "the rule is well settled to this extent, that as it would be expecting too much of a purchaser to decide at his peril on the validity of a title set up in opposition to that which his vendor undertook to convey, the former should be allowed, by way of damages, the taxed costs of any action by which he has *reasonably* sought to maintain or defend that title." In *Clark v. Robertson* (8 U. C. Q. B. 370) the learned Chief Justice of Upper Canada recognises the au-

thority of *Smith v. Compton*; and having at *nisi prius*, in that case, told the jury that the plaintiff could not, in an action for a breach of covenant for title, recover the costs in a suit brought to dispossess him of the land, when the case came up in term he observed, "I even charged less favourably for the plaintiff in regard to the amount of damages than I think I should have done; for I discouraged any allowance for costs of the ejectment by which the plaintiff had been dispossessed, though I am now satisfied that she was entitled to them, as Mr. *Prince* contended, if entitled to damages at all."

Although the author of *Mayne on Damages*, at page 27, seems to question the propriety of the decision of *Smith v. Compton* as to the point that the costs of the former suit properly formed a part of the damages in the latter one; yet looking at the doctrine laid down in our own courts, and the general current of authorities in the United States, referred to in *Rawle on Covenants*, we do not feel warranted in considering *Smith v. Compton* bad law, until it is expressly overruled.

As to notice of the original action being brought affecting the right to recover costs, it seems to me if it is assumed that there was *reasonable* ground for defending the original action, then the want of notice can be no objection, the object of a notice being generally to bind the party to the decision in the first action. In the absence of any thing shewn to the contrary, it will be assumed to be *reasonable* to defend a title when the party holds a covenant for a good title.

The mere payment of the costs in an action of this sort can make no difference; the liability to pay is sufficient to warrant their being claimed as damages.

We are therefore of opinion that the damages in this action should be increased to £132 17s., pursuant to leave reserved.

Rule absolute.

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## DAFOE V. THE JOHNSTOWN DISTRICT MUTUAL INSURANCE CO.

*Insurance—Avoidance of policy—Ratification.*

The plaintiff insured with the defendants on a policy, containing a condition avoiding the same if any double insurance should subsist without the defendant's consent. The plaintiff's father, without plaintiff's directions, paid the premium for an assurance on part of the same premises with another company, but no policy was issued until after a fire had consumed the premises, and the plaintiff received the insurance money on the second policy.

*Held*, 1st. That an insurance had in fact been effected with the second company within the terms of the condition contained in the policy issued by the defendants, 2nd. That the plaintiff having taken the benefit of such assurance, he had thereby avoided the policy issued by the defendants.

This was an action on a policy effected by plaintiff with the defendants on a building in Belleville, against loss by fire. Averring total loss and claiming £500, the amount insured. The 13th condition of policy set forth in declaration was in these words :

“In case insurance shall subsist or be effected on the premises or property assured by this company in any other office, or from, by, or with, any other person or persons during the continuance of such insurance, the policy granted therein by this company shall be void, unless such double insurance subsist with the consent of the directors signified by such indorsement on the back of the policy signed by the president and secretary; that then this company shall be liable only to pay a rateable proportion of any loss or damages which may be sustained along with such other office, person or persons.”

The defendants pleaded two pleas, averring in substance that after making the policy, and before the loss, plaintiff affected another insurance on same property with the Beacon Assurance Company for £500, without consent of defendants specified by endorsement; nor did they ever consent thereto, although a reasonable time had elapsed for giving such assent before the fire, contrary to the conditions and contrary to the statutes in that behalf. Issue was taken thereon.

At the trial at the last assizes at Belleville, before *Hagarty*, J., it was admitted that plaintiff had *prima facie* right to recover the full amount unless defendants could prove their pleas.

The policy was produced, no assent was endorsed.

John Thomas, inspector for the Beacon Company, proved: that application was made to him by Zenus Dafoe (father of plaintiff), to insure the "Dafoe House" in behalf of plaintiff. Application produced. It stated that £500 already insured on part of same premises with the defendants, the date was in blank, about last of June, 1855. Interim receipt produced, dated the 28th of June, 1855 for £15 15s. premium, this was paid by Zenus. Receipt signed by Greenshields, local agent for the Beacon. Witness could not be sure whether he directly communicated with plaintiff: thinks he did not speak to witness about it till after the fire: plaintiff lived three and a-half miles from the premises: Zenus appeared to act as his agent: after the fire plaintiff came to see about it: applied to recover the insurance: witness went with him to Greenshield's: policy was not issued till after the fire, which took place on the 11th of August: policy dated the 4th of September: plaintiff acted as one having an insurance with the Beacon, and expected it was all regular.

Greenshields, the agent, proved giving of interim receipt: policies issue from Kingston: a week or ten days generally elapses between receipt and policy: people were given to understand that the company recognise his receipts, which was the case: company never repudiated this assurance, but paid it. Plaintiff came to witness after the fire, and appeared excited at having only a receipt and not a policy: I told him it would be all right. A clerk of the Beacon company produced the plaintiff's affidavits of loss, dated the 18th of August, 1855: usual proof of loss given, and plaintiff drew on the company for amount and his drafts were paid. This insurance was not notified to the company till after the loss: the board inquired into the facts and determined to pay: policy was issued that receipt might be endorsed as a voucher for the London office.

Mr. Smart, a director of defendant's company, proved a conversation with plaintiff after the fire: he admitted the insurance with the Beacon and its non-communication to defendants, and said nothing as to his not knowing of the insurance with the Beacon having been effected, or that it was done without his knowledge.

The plaintiff in reply, called his father, Zenus Dafoe, who swore, that Thomas, the Beacon inspector, asked him to get an insurance with his company, and suggested putting £500 on the old building, being that already insured with defendant : witness paid the premium, and took receipt produced, never spoke to plaintiff about it to his knowledge : plaintiff never knew witness had effected this insurance till after the fire, witness then told him ; at first he was annoyed and found fault ; witness was not plaintiff's general agent, but did it because he heard plaintiff talking of insuring, and because Thomas applied to him : witness was not in the habit of signing plaintiff's name : he made no charge against plaintiff : they never settled accounts : plaintiff has been doing for himself for many years. When plaintiff spoke to witness about insuring, witness said he thought it could be done cheaper : it was done cheaper ; he did not object to getting it done : witness mentioned Thomas's name to plaintiff, and said he (witness) thought it could be done cheaper, this was about the new building (this insurance is on the old building) : witness took it on himself to do it : plaintiff found fault with witness for insuring the old building, after the fire : that a notice should have been given, so he said : he said he heard it was insured before I told him, after the fire : witness often saw plaintiff after he effected the Beacon Insurance and before the fire.

The plaintiff contended, 1st. That as this second insurance was effected without plaintiff's knowledge, it was not a breach of condition ; and 2nd. That as the Beacon Company had only given a receipt ; they paid voluntary, and it was not a legal binding assurance.

The defendants called attention to the statute 6 Wm. IV., ch. 18, sec. 21 (under which they are incorporated), which is almost verbatim with the 13th condition. It was left to the jury to find whether plaintiff by himself, or through his father, effected an insurance with the Beacon. Was he cognizant of it, or was it wholly unauthorised by him ? His subsequent adoption and acceptance of this money should not be overlooked in weighing the evidence : that to allow a person assured under such a condition to take the benefit of an insurance not notified to defendants, and then to insist as an

excuse for not notifying, that it was effected without his sanction, might introduce most dangerous abuses. The judge did not rule that taking the benefit of the insurance should be taken as conclusive evidence that it was effected with plaintiff's sanction. As to whether there was an actual insurance effected with the Beacon company without a policy being actually issued, the ruling was with the defendants.

Leave was reserved to plaintiff to move to enter a verdict for him if the court should be of opinion that no insurance was effected with the Beacon within the terms of the policy.

Leave was also reserved to defendants (if jury found for plaintiff) to move to enter verdict for them, if the court were of opinion that the acceptance of the money and benefit of the policy is legal conclusive proof *per se* that it was effected by plaintiff's sanction, subjecting him to conditions as to giving notice.

The jury found for plaintiff, £555.

In Easter term *A. Richards* moved, on leave, to enter a verdict for defendants. He cited *Ellis on Insurance*, 178; *Beaumont on Insurance*; *Perry v. Newcastle Insurance Company*, 8 U. C. 363, *Duer on Insurance*; 1 *Park on Insurance*, page 3. On first point *Broom's Legal Maxims*, 345; *Marsh v. Keating*, 1 Bing. N. C. 215; *Sutherland v. Pratt*; 12 M. & W. 16; *Foster v. Pollard*, 12 M. & W. 226; *McLean v. Dunn*, 4 Bing. 772; *Wolff v. Horncastle*, 1 B. & P. 316; *Routh v. Thompson*, 13 East 274; *Hagedorn v. Oliver-son*, 2 M. & S. 485, on the main point; 2 *Duer* 94, 49, 152.

*Walbridge*, for plaintiff, cited *Jackson v. Massachusetts Mutual Fire Insurance Company*, 23 Pick. 418; *Stacey v. Franklin Insurance Company*, 2 Watts & Sargeants, 506; *Clark v. The New England Mutual Fire Insurance Company*, 3 Cus. 342; *Ramsay Cloth Company v. Johnstown's Mutual Company*, 11 U. C. 516.

HAGARTY, J., delivered the judgment of the court.

As to the first point argued, we think that according to the uniform principles governing such conditions an insurance was effected with the Beacon company within the terms of the 13th condition. We think it would be contrary to principle to enter into a technical inquiry whether the



Beacon company could or could not have successfully resisted the plaintiff's claim. That they admitted his right and paid the amount is the best answer after all to the objections. We fully concur in the judgment of the Court of Queen's Bench, in Ramsay Cloth Company against these defendants (11 U. C. 516), on an objection almost the same.

As to the main point, the facts are after all very simple. The defendants, both in their statute and conditions, provide for the policy becoming void if any other insurance "shall subsist" which may not be consented to by them by endorsement on their policy.

An insurance, not so consented to, did in fact "subsist." In support of plaintiffs claim we may concede that his interest in this policy is not to be defeated by the wholly unauthorised act of a stranger effecting a second assurance in his name without his knowledge. His course in such a case would be clear. Immediately on delivering it he could repudiate the act and decline taking any benefit under it. In the case before us, the plaintiff chose at once to adopt and ratify the assurance made, as is alleged by his father in his name. He filed affidavits and proofs of loss and received a large sum of money under it.

The principle to be deducted from a very large series of cases on this head is, we conceive, clearly, in the words of the old maxim, "*omnis ratificatio retro trahitur et mandato priori æquiparatur.*" The act of the agent is assumed as the act of the principal from the beginning. It is considered as wholly done with his assent; and as he is willing to receive the benefit, he must take all the legal consequences.

The rule is well stated by *Tindal*, C. J., in *Wilson v. Tumman* (6 M. & G. 239), "That an act done for another by a person not assuming to act for himself, but for such other person, though without any previous authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or contract, to the same extent as by and with all the consequences which follow from the same act done by his previous authority.

The case of *Bird v. Brown* (4 Ex. 798), which recognises the qualification that the ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies, is very full and clear on the main point.

*Buron v. Denman* (2 Ex. 167) was an action of trespass against the commander of a Queen's ship for destroying slave barracoons on the African coast belonging to plaintiff. The subsequent approval by the Queen was held, by relation, to have adopted the act of defendant, and barred the action. "The ratification of the Crown is equivalent to a prior command."

*McLean v. Dunn* (4 Bing. 722) is a strong case, where a man, without authority made a written contract for the purchase of goods by another, who afterwards ratified the contract. This was held to give the agent authority, by relation, to make a sufficient writing, under the Statute of Frauds, which requires the signature of the party to be charged, "or his agent thereunto lawfully authorized."

A number of cases are collected in *Arnould on Insurance*, vol. 1, page 167, in support of this proposition, "The subsequent adoption of the policy by the party for whom it was intended to be made, is equivalent to a previous authority to make it, and constitutes the party making it "a person receiving the order to effect the insurance," within the meaning of the act 28 Geo. III., ch. 56, which provides for inserting in the policy the name, "of the person who shall give the order to the agent immediately employed to effect it."—*Wolff v. Horncastle* (1 B. & P. 316), *Routh v. Thompson* (13 East, 274), *Hagedorn v. Oliverson* (2 M. & S. 485.)

In many of the cases cited the ratification or adoption of the agent's acts did not take place till after the happening of the loss so insured against.

We would also refer to the very instructive chapter in *Broom's Legal Maxims*, page 676, and the cases there cited in support of this well known rule of law.

Rule absolute to enter verdict for defendant.

## BROGDEN V. COLLINS ET AL.

## SPECIAL CASE.

*Registry of judgments—Construction of 9 Vic., ch. 34, and 13 & 14 Vic., ch. 63.*

A conveyance from an execution debtor made prior to 1st January, 1851, and to the registry of a judgment upon which *Fi. Fa.* lands issued was held to prevail against a deed from the sheriff under such *Fi. Fa.*, although such conveyance was not registered till after such judgment, but before the delivery of the *Fi. Fa.* to the sheriff.

Action of ejectment brought to recover possession of part of lot 28 in the 5th concession of Clarke in the county of Durham.

A special case was stated by consent for the opinion of the court, from which it appeared.

The plaintiff claimed as vendee of the sheriff by deed dated 18th of September, 1855, registered 5th of March, 1856. The sale was on a *fi fa.* lands in suit, McIntyre v. C. C. Haight, delivered to the sheriff on the 23rd of June, 1854, on a judgment recovered 10th of June, 1853, and registered 15th June, 1853. Defendant claims under a title through several persons, beginning with a deed from Haight, the execution defendant; dated and executed 1st of January, 1849, but not registered till 6th of February, 1854.

*Weller* for plaintiff.

*M. R. Vankoughnet* for defendant.

On the argument the following cases were cited—*Doe Dempsey v. Boulton*, 9 U. C. Q. B. 532; *Doe Dougall v. Fanning*, 8 U. C. 156; *Burnham v. Daley*, 11 U. C. 211; *Baby Qui tam v. Watson*, 13 U. C. 531.

HAGARTY, J., delivered the judgment of the court.

The case turns on the registry acts. The conveyance made by Haight, under which defendant claims, was made in 1849, long before judgment had been recovered or registered. The statute 13 & 14 Vic., ch. 63, sec. 3, declares void, as against prior registered judgments, deeds made after 1st January, 1851, and is therefore inapplicable to this conveyance. It declares the effect of a registered judgment entered up after 1st of January, 1851, to be substantially equivalent to a charge in writing of his lands by the judgment debtor. The 9th Vic. ch. 34, sec. 13, declares that the registered judgment shall bind all lands *belonging to the party against*

*whom it* is rendered from the date of recording the same. Without the aid of the 3rd section of 13 & 14 Vic., ch. 63, which places registered judgments and deeds on the same footing as to priority, and which it seems conceded does not touch the conveyance of 1849, we do not see on what the judgment in this case against Haight could attach in June, 1853, when recovered and registered. He had nothing then in the land which he could charge in favour of the judgment creditor. Till the last mentioned section became law the registration of the judgment, as we understand it, simply bound the lands according to the interest the debtor then had in them. A prior conveyance made by him might, we presume, have been defeated under the law as the 9 Vic., ch. 34 left it, by the sheriff's vendee under the judgment getting his title recorded before the earlier deed. In this case the conveyance from Haight was, however, recorded in February, 1854, before the delivery of *fi. fa.* lands to the sheriff, which the plaintiff afterwards purchased. We think there should be.

Judgment for defendant.

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## TRINITY TERM, 21 VICTORIA.

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Present—The HON. WILLIAM HENRY DRAPER, C. J.

“ WILLIAM BUELL RICHARDS, J.

“ JOHN HAWKINS HAGARTY, J.

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The three following judgments were delivered before the return of the Chief Justice, on the first day of Term: viz., CRAWFORD v. THOMAS, SPARKS v. JOSEPH, and SLADDEN v. SMITH.

### CRAWFORD v. THOMAS, SHERIFF.

#### *Replevin—Damages.*

The defendant replevied certain account books under a writ in suit of Crawford v. Brown, and handed them to plaintiff, but before a removal could be effected, and while the parties were yet together, another writ of replevin in the suit of McLaren v. Crawford was placed in the hands of the sheriff, who thereupon again seized the books.

*Held*, the taking of property under one writ of replevin does not prevent the operation of a second writ upon the same property under provincial statute 14 & 15 Vic., ch. 64, and 18 Vic., ch. 118, and further, that the delivery as above stated, was complete.

This was an action brought against the defendant as sheriff of the county of Wentworth, for a false return to a writ of replevin in the suit of Robert Crawford v. Michael Wilson Brown, to recover certain ledgers, day-books, &c., of plaintiff, in which the accounts and transactions of Messrs. Nixon & Swales, forwarders, were entered. By returning that he had replevied the said books, &c. to the plaintiff, when he had not done so.

Defendant pleaded not guilty.

The case was tried before *Burns, J.*, at the spring assizes of 1857, in the city of Hamilton; the facts were these: on the 29th of December, 1856, when plaintiff's writ of replevin was first sued out, the books were in the possession of James Stephenson, who stated he held them for W. P. McLaren. The deputy-sheriff on that day, Saturday, went to take the books, but Stephenson objected, stating the books were held

by McLaren, and he would not give them up until he consulted a lawyer, Mr. Sadlier, who said the writ was wrong, and if plaintiff's attorney would make it against McLaren he would defend it. He returned to Stephenson to take the books, when Mr. Sadlier undertook that the books should be forthcoming. The deputy-sheriff further stated he did not, then know whether these books were those he was directed by the writ to take. He left the books there until Tuesday, and then went at the plaintiff's request, to give them to him; Stephenson refused to give them up until he saw Mr. Sadlier; he went and saw Mr. Sadlier, who told him to give them up. He returned, and after some time the books were all collected and put on the floor. The deputy-sheriff then took the bill book and handed it to the plaintiff, and said he delivered that in the name of the whole of the books. Plaintiff took it and laid it down, and said he had better get a cab and take them. He was stooping over the books when a clerk of Mr. Sadlier's handed another writ of replevin in the suit of McLaren v. Crawford, the present plaintiff, to the deputy-sheriff, for the same books; after looking at it, the deputy-sheriff said he again levied on the books, and plaintiff could not have them; the books were then left with Stephenson for McLaren.

Burton & Sadlier were attorneys for McLaren in his replevin suit. The amount of debts due Nixon & Swaels entered in the books was from fifteen to nineteen hundred pounds, according to one witness. From £75 to £80 of these debts were collected by Stephenson by direction of McLaren: according to another witness the balance due on the debts would not amount to £1000, if that could be collected. Mr. *Sadlier* moved for a non-suit on the ground that there was a good delivery to plaintiff, and that he cannot say that the return was untrue, because he would not allow him to take them away after the second writ had been placed in the sheriff's hands.

The learned judge declined to nonsuit, because he was not satisfied the alleged delivery to plaintiff was complete, for the sheriff gave with one hand, and took them back with the other; and the second writ of replevin was not then put

in. Afterwards it was put in, and appeared to have been sued out on Monday the 29th December, when the books were still in Stephenson's possession.

The learned Judge told the jury he thought the issuing of the last writ of replevin irregular, and that defendant should have returned to it; that under the first writ he had replevied the books, and delivered them to another party—viz., the plaintiff in the first writ. That inasmuch as the return to the plaintiff's writ was not made when the sheriff refused to allow plaintiff to take the books away, his formal delivery amounted to nothing, as in fact he was not under it allowed to take the books away; and his delivery and refusal to allow plaintiff to take them was all one act. He therefore directed that the first writ was not fully executed, and that they should find for plaintiff. But he gave leave to defendant to move to enter a nonsuit, if the court should be of opinion that there was a sufficient delivery of the books, and execution of that writ. There was no ground for supposing that defendant was acting collusively with the other parties, although the second writ was sued out by the attorney who was the sheriff's legal adviser.

Defendant's counsel wishes it left as a fact to the jury to say if the books had been replevied to plaintiff by sheriff. The judge directed the jury that in his view they had not. The jury found a verdict for plaintiff, damages 1s.; and found the value of the debts in the books uncollected £1000, and the value of the debts collected and in hand £75, and gave leave to plaintiff to move to increase the verdict to £75, or £1075, if the court should be of opinion he was entitled to collect either of these sums.

In Easter Term *Galt* for plaintiff moved to increase the verdict pursuant to leave reserved; and *Sadlier* for defendant obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for defendant pursuant to leave reserved, and for misdirection, as the facts shew there was a delivery of the book to plaintiff according to the exigency of the writ, and that the goods were seized in good faith under another writ against them at the suit of another party, and that the sheriff was protected

by his writ in delivering the property according to its exigency, whether it was regular to issue the second writ or not, he having acted in good faith, and without collusion. His rule also called on plaintiff to shew cause why the proceedings should not be stayed on payment of costs and delivery to the plaintiff of the books, the subject of the replevin.

During the term both rules came on to be heard together

Mr. *Galt* for plaintiff contended that the goods could not be replevied after having been once seized by the sheriff and delivered to a party; that at all events there had been no delivery of the article to the plaintiff; that whilst the plaintiff was told the goods were there, to take them; before he could carry them away the sheriff stated he could not take them. That he had another writ by which he was commanded, to deliver the goods to another party. As to the damages, he contended that the books were the means by which the indebtedness of the different parties named therein was shewn, and that if plaintiff, having a legal right to the possession of the books, and to receive the amounts due from the several parties who were owing the debts to Nixon & Swales, was deprived of them, he was deprived of the means of collecting those debts, and therefore the reasonable damages plaintiff was entitled to was the amount of the debts. As to the money actually collected, he certainly ought to recover, for it was received for those very debts, and plaintiff was entitled to it. That as to the second part of defendant's rule, it ought not to be granted because, in consequence of the detention of the books, he had not been able to go on at once and collect the debts, and in consequence, some of the parties had failed, and plaintiff could not be put in *statu quo*, and therefore the court ought not to relieve him, and defendant should pay the full value of the debts.

*Sadlier contra.* A second replevin could be when it was between different parties otherwise when property was replevied by one wrongdoer out of the possession of another wrongdoer, the true owner might be deprived of the possession of it to his ruin. Take the case under consideration, the books, the subject of the action, were in the first replevin valued at about £20, and the bond was taken supposing that



to be the value. Now the plaintiff claims they are really worth to him £1000. So this plaintiff, by giving a bond, may deprive the real owner of the possession of property, worth, as he declares, £1000; because he by a proceeding in replevin took them from the possession of a party who had equally no right to them with himself, and the true owner has no means of recovering his property until the litigation between these two wrongdoers is terminated; the law could not permit such an absurdity. That if the second writ of replevin could legally issue, then the sheriff was bound to retake the goods after having delivered them to plaintiff, and it made no difference if he waited until plaintiff had taken them down to his own house, or retook them at once; he had in fact delivered them to plaintiff, and only took them back again as he was commanded by his writ. As to the damages it was absurd to say that plaintiff should recover £1000 for the detention of articles which he himself had only valued at £20, and as to the debts exhibited in his books, he, if entitled to them, could *collect* them without the books, and in fact could compel their production on a subpoena, before any court. As to the amount collected, that could not with propriety be recovered in this action, for it was money had and received to plaintiff's use, if he was entitled to it, and the rights of the parties as to who were really entitled to these debts and the books could be best settled in that action. If the court should be against defendant on all these grounds, they would, nevertheless, in exercise of their equitable powers, grant the relief prayed for, as defendant was a public officer acting in good faith.

HAGARTY, J., delivered the judgment of the court.

In forming our judgment in this case we have to decide on the construction of our provincial statutes 14 & 15 Vic., ch. 64, explained by 18 Vic., ch. 118, almost wholly unaided by reference to English authority. As we understand the law in England, the plaintiff in this case could hardly have been able to have replevied the books at all. They never had been in his actual possession, and there was no taking of them out of his possession to have entitled him to

maintain replevin. The remedy in England (admitting its applicability to cases other than distresses for rent or services), seems confined to the recovering the possession of property, unlawfully as some plaintiff asserts, taken out of his possession. Then there must be a taking from the plaintiff in the first instance, before he can resort to replevin to recover his possession. As the word itself intimates, it is a redelivery on pledges.—*Mennie v. Blake* (2 Jurist, N. S. 953), a case decided last year, gives us an instructive view of the action, and confines it to the state of facts just suggested.

Our legislature has widely extended the remedy, and declares, “whenever any goods, &c., shall be wrongfully distrained, or otherwise wrongfully taken, or wrongfully detained, the owner, &c., *who by law can now maintain an action of trespass or trover* for personal property shall have or may bring an action of replevin for the recovery of such goods, &c., and for damages, &c., in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress.” Section 8 provides for the case “where the original taking is not complained of, but the action is founded in a wrongful detention thereof, the declaration may be the same as in detinue.” Section 9 recognises the same distinction.

On this statute we cannot come to the belief that the taking of property on one writ of replevin prevents the operation of subsequent writs against the same property for different claimants. The language used by the legislature is far too wide: The right to issue the writ is given to any person who can by law maintain trespass or trover. The present plaintiff issued his replevin. McLaren subsequently chooses to take the same course. We cannot debar the latter of the right given him by the statute, nor limit the number of replevins that may be issued on such an enactment however palpably inconvenient their conflicting claims may be.

In the present case, assuming such view of the statute to be correct, we do not see how the defendant in this case should be held liable even for nominal damages. We think on the evidence that he executed the plaintiff’s writ as far as he possibly could, and was then compelled by the second

writ in favour of McLaren to undo what he had first done, as much as if, while informing a prisoner in gaol that he was free by virtue of a *supersedeas* from the writ on which he was then in custody, another *capias* from another creditor was handed to him, the sheriff, on which he was compelled at the same moment to re-arrest. Had a third replevin arrived while the sheriff was delivering the books to McLaren, he would have done no more than he did in the present case.

Under our replevin law it might be dangerous to hold that the execution of the first replevin barred the operation of all others. A wide door for collusion would thus be opened. A confederate could always by a sham replevin baulk the just demands of creditors, and effect the very mischief the act was intended to obviate.

With the view we have expressed, it is unnecessary to consider the question of damages on the leave reserved.

We have not omitted to notice that the second writ of replevin appears to be against the present plaintiff, Crawford, as defendant. We do not see how this was in accordance with the fact, that until the formal delivery and momentary receipt of the books by Crawford, he does not appear to have been in possession of the property replevied.

Rule absolute for nonsuit,  
and rule to increase verdict discharged.

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## SPARKS V. JOSEPH.

### *False Statement—Action.*

Although as a general doctrine of law a party who makes a false statement knowing it to be such, which is acted upon by another, may be held liable for any injury thus caused, yet where a party, in laying an information before a police magistrate, had given an incorrect version of the statement made to him by the defendant, and caused the plaintiff's arrest, it was held that an action therefor could not be maintained against the defendant,

The declarationallegesthat plaintiff was master of a schooner called the Bellow, and brought from Pickering to Toronto, consigned to defendant, 30 cords of wood, which wood defen-

dant requested and empowered plaintiff to sell for him; that he sold the same to one Andrew Anderson for money paid by him, of which defendant had due notice, yet defendant refused to allow Anderson to take the wood, and falsely, &c., intending to injure plaintiff and to cause him to be arrested and detained upon a charge of misdemeanour, then and there falsley and maliciously represented and asserted to said Anderson that the defendant had not authorised the plaintiff to sell the said wood, and by false representation and assertion induced Anderson to believe that he the plaintiff had obtained the money so paid by Anderson to plaintiff by falsely pretending to have authority to sell the wood. And Anderson, by means of the said false and malicious representation of defendant so made to him and in consequence thereof, believing plaintiff had obtained the money by falsely pretending such authority, on the 28th day of April, 1856, went before George Gurnett, Esq., Police Magistrate, for the city of Toronto, and made complaint in due form of law that plaintiff had fraudulently and by false pretence, obtained the money of the said Anderson so by him paid to the plaintiff for said wood, and then and there caused plaintiff to be arrested and detained in custody on the said charge for four days, until he was discharged. Damages £200.

Defendant pleaded the general issue of not guilty, on which issue is joined.

At the trial, before Sir *J. B. Robinson*, C. J., at the last spring assizes held in Toronto, it appeared that in April, 1856, one Lumsden in Pickering sent by plaintiff's vessel to Toronto, a quantity of firewood; that when it arrived defendant stated he could not put it in his yard, and as plaintiff's witnesses stated it, wished plaintiff to sell it for him as defendant's witnesses stated it, he wished plaintiff to ascertain if he could sell it for him. That plaintiff sold some of the wood, about 23 cords, to Mr. Anderson, and took his pay for it partly in cash and partly in a note of Anderson's, which he said he would leave with defendant, (*quære*, to whom payable,) that on the evening of the same day he sold the wood, his vessel went back again to Pickering, and he had not given the money or note to defendant.



Anderson went for the wood next day, when Mr. Tinning, on whose wharf it was, refused to deliver it to him; defendant had in the mean time sold it to Mr. Stevenson of the Montreal Bank. Anderson went to defendant to see about the wood—he told Anderson he had given no authority to Sparks to sell it. Anderson could not get the wood; and five or six days after he saw plaintiff, and told him he could not get the wood, plaintiff said, go and take it. Anderson then went to Mr. Gurnett the Police Magistrate, on the 28th of April, and laid information on oath, that on the 22nd of that month, plaintiff sold him about 23 cords of wood, for which he paid Sparks in full by giving him a note for £8 15s., and the balance in cash, £20. That thereupon the plaintiff left Toronto, the wood being on Tinning's wharf, and when he commenced to draw it away he received notice from defendant, that the wood was his, Sparks having sold it prior to his purchasing it and thus receiving his, Anderson's money fraudulently, and under false pretences, and praying that plaintiff might be arrested; on this a warrant was issued, on which plaintiff was taken into custody, and gave bail for his appearance; afterwards, on examination into the facts, he was discharged; he lost three days by attending to this matter, and a week's use of the vessel, said to be worth £30.

For defence it was contended that Anderson's statement in the information before Mr. Gurnett was not such as Joseph made to him, nor such as the statements proved by Anderson to have been made would warrant, and the injury to plaintiff arose from what Anderson stated, not from what defendant told him, or in a mistake as to what defendant told him. The learned C. J. stated that it was a case for the jury, because Anderson then further stated on the trial that he had no doubt he gave a true statement to the magistrate, and if the jury thought from the evidence shewn that the statement given to Mr. Gurnett could not have been the one Joseph made to Anderson, then the warrant did not issue on defendant's information. On referring to the declaration, he observed that it sets out a statement of defendant that plaintiff had no authority to sell as the ground on which

Anderson made the statement, and does not aver that defendant made any such statement as Anderson swore to, when he took the warrant. In his charge to the jury he stated that the ground of action was, that defendant told Anderson that plaintiff had not his authority to sell the wood; that Anderson, believing him when he stated this, charged plaintiff with fraudulently obtaining the money under false pretences. He observed that Anderson had no authority from defendant for stating any other ground but what defendant had given to him, yet he goes and swears that plaintiff had sold wood to him, which he had before sold to some one else, and this is a different statement from that made by defendant. He further remarked that it was immaterial whether Anderson went beyond defendant's statement made to him, or the Police Magistrate mistook what Anderson said, defendant would not be responsible for either.

In conclusion, he observed as to the merits, that plaintiff seems to have sold the wood (if for defendant) and taken away the money, instead of paying it to Joseph, and as the action was not against defendant for himself maliciously prosecuting, but to make him responsible for a charge made by another party, it is most necessary to shew that defendant's statement was such as Anderson embodied in his information.

In Easter Term last, John Bell of Toronto obtained a rule *nisi* for a new trial without costs, on the ground of misdirection in charging that the plaintiff's cause of action failed on the evidence.

Mr. *A. Crooks* shewed cause, and referred to *Moore v. Lucas*. 7 Moore, 352; *Longmeid v. Holliday*, 6 Ex. 761.

*Bell*, contra, referred to *Pechell v. Watson*, 8 M. & W. 691; *Polhill v. Walter*, 3 B. & Ad. 114; *Gerhard v. Bates*, 2 E. & B. 476; *Milne et al. v. Marwood*, 15 C. B. 778; *Thom v. Bigland et al.*, 8 Ex., 725; *Craig v. Hasell*, 4 Q. B. 481; *Farley v. Danks*, 4 E. & B. 493; *Bailey v. Porter* 14 M. & W. 44; *Cocks v. Masterman*, 9 B & C. 902; *Taylor v. Ashton*, 11 M. & W. 401; *Evans v. Collins*, 5 Q. B. 805, 820; *Pasley v. Freeman*, 2 Smith's Leading case, 62; *Lewis v. Nicholson*, 18 Q. B. 503; *Randel v. Trimen*,

25 L. J., C. P., 307; *Malden v. Fyson*, 11 Q. B. 292; *Ormrod v. Huth*, 14 M. & W. 651.

When cotton sold by sample turned out to be inferior to it no action lies for false representation unless defendant at the time knew it to be false.

*Wylie v. Birch*, 4 Q. B. 566.

RICHARDS, J., delivered the judgment of the court.

Having gone over the authorities referred to by the plaintiff, we think they will sustain the general doctrine that a party who makes a false statement, knowing it to be such, to be acted upon by another may be held in law liable for the injury caused by its being so acted on. In this case, however Anderson did not, in his information before the police magistrate, on which the plaintiff was arrested, make the statement or charge (as the false pretence) which had been communicated to him by the defendant. The charge before the magistrate was substantially that plaintiff, having sold the wood to defendant, afterwards fraudulently sold it to him Anderson, and thereby under the false pretence that the wood was his, and that he had a right to sell it, obtained his, Anderson's money. The evidence at the trial shewed that all defendant stated was, that he had given no authority to plaintiff to sell the wood. We understand that it was left to the jury to say if Anderson made the statement to the magistrate from the information he received from defendant, because, if the facts he related to Mr. Gurnett were different from those stated to him by defendant, then neither defendant nor Anderson can be said to have caused plaintiff to have been arrested by means of his, defendant's false and malicious representation (being the only ground on which this action lies), the warrant issued on another state of facts. On this the jury found for the defendant. We cannot say that this finding was not correct, or that the law in relation to it was not properly laid down by the learned Chief Justice. There was also conflicting evidence as to whether defendant did more than authorise plaintiff to enquire whether he could sell the wood for him; this was not left to the jury, and they have expressed no opinion as to it. Looking at all the

facts of the case—as we are not prepared to say there was any misdirection, or that the verdict is not warranted by the evidence—we do not consider that the plaintiff shews any other grounds on which we can interfere, the verdict will therefore stand.

Rule discharged

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SLADDEN V. SMITH.

*Merger—Statute of limitations.*

Where a tenant for life and the reversioner in fee had conveyed property in fee simple by one deed of bargain and sale to one person, it was held that the life estate did not merge in the reversion, and that the Statute of Limitations did not run against the remainder man till the death of the tenant for life.

EJECTMENT, to recover part of the west part of lot No. 8, on the north side of Richmond Street, described as commencing on the east side of York Street, at a point distant sixty-four feet, southerly from the southern limit of Queen Street, thence easterly, parallel to Queen Street, eighty-two feet; thence southerly, parallel to York Street, twenty feet; thence westerly, parallel to Queen Street, eighty-two feet, more or less, to York Street; thence northerly along the east side of York Street twenty feet to the place of beginning. The defendant appears and defends for the north part of the land described in the writ, and being seven feet in front on York Street, by eighty-two feet deep, and lying parallel to Queen Street, and being part of lot No. 8, on the north side of Richmond Street, in Toronto.

The case was brought down to trial at the Toronto fall assizes, in October, 1856. It appeared on the trial that Robert Scott, a colored man, lived on the *locus in quo* forty years since; he went to Queenston in 1812, as a volunteer, and died many years ago in possession.

The following paper title was proven:

Robert Scott, by his last will, not dated, but which was proven before the Surrogate of the Home District, on the 12th of November, 1816. Devised, “unto Sarah Long, of York, a black woman, for and during the time of her natural life, his house and lot of ground in the town of York, containing one acre, more or less, being the same lot which he bought from Forbes Mitchell; and after the decease of the



said Sarah Long, he gave and devised the said lot and house, and all the reversion in fee simple to David Long, son of the said Sarah, and to his heirs and assigns for ever.

By a certified copy of a memorial, signed by grantors, and proved before the deputy register of the county of York, by Andrew Mercer, Esq., it appears that on the 1st of December, 1827; by deed of bargain and sale ' Sarah Long, of the town of York, widow of Peter Long, then late in the late Home then Newcastle District, and David Long, son of the said Sarah Long, labourer, in consideration of natural love and affection, and 5s., granted, bargained and sold, to James Long, of the township of Esquesing, in the District of Gore, yeoman, also a son of the said Sarah Long, his heirs and assigns, for ever, two-tenths of an acre of the north-west part of lot No. 8, on the north side of Hospital Street, in the town of York, bounded as follows: commencing on the south side of Lot Street (now Queen Street), equi-distant from the north-west angle of lot No. 8, on York Street, and the north west angle of a certain one-fourth of an acre in the said lot heretofore sold and conveyed to William Dundas: thence south sixteen degrees east, parallel to the eastern boundary line of the said lot, one chain fifty-eight links, more or less to the centre of the said lot; then south seventy-four degrees west, parallel to the southern boundary of the said lot to York Street; thence north sixteen degrees, west along the eastern limit of York Street, one chain fifty-eight links, more or less, to Lot Street; thence north seventy-four degrees east along the southern limit of Lot Street to the place of beginning. Habendum to James, his heirs and assigns, for ever.

On the 21st of May, 1844, David Long, by deed of bargain and sale, with an expressed consideration of £200, conveyed to Jared Banks, of the City of Toronto, latter, two-tenths of an acre of land, being composed of part of the west part of lot No. 8, on the north side of Hospital Street, described as follows: commencing at the centre of the lot on York Street, then northerly along the easterly limit of York Street to the southern limit of Lot Street, one hundred and two feet six inches, more or less, then easterly along said

southern limit eighty-two feet; then southerly paralled with York Street. one hundred and two feet six inches, more or less, to the centre of the said lot; then westerly, parallel with Lot Street, eighty-two feet more or less, to York Street, and then to the place of beginning. On the 6th of April, 1847, by deed of bargain and sale, Sarah Long, Hannah Goodlie (formerly Hannah Long), Elizabeth Long, and Rachael Long, all of the town of Niagara, but formerly of the town of York, being the daughters of the late James Long, of York, aforesaid and David Goodlie, in consideration of 5s., by deed of bargain and sale, conveyed to Jared Banks, of Toronto; yeoman, 3,400 square feet of lot No. 8, on the north side of Richmond Street, then Hospital Street, in Toronto; commencing on York Street, at the centre of said lot, No. 8, thence northerly along York Street, forty-feet; thence easterly parallel with Queen Street, eighty-five feet, more or less, to the easterly limit of the lot sold by Sarah Long and David Long to James Long, by deed, dated 1st of December 1827; and registered in the registry office of the county of York on the 1st of April. 1828; thence southerly, parallel with York Street, forty feet to the centre of said lot No. 8; thence easterly, parallel with Queen Street to the place of beginning.

It does not appear that this deed was executed before two magistrates, or a judge, or chairman of the Quarter Sessions, or that the wife of Goodlie was examined apart from her husband touching her consent to part with her interest in the land.

By indenture, dated 20th of October, 1853, made between Jared Henry Banks, of the City of Toronto, infant son and heir at law of Jared Banks, deceased, of the first part, Rachael Banks, of Toronto, widow of Jared, of the second part, John Boulton, of the same place, Esquire, of the third part, John Higgins, of the same place, bailiff, of the fourth part, (the said Jared Banks having died intestate, and the property having been mortgaged, the same being about forty feet on York Street, by eighty feet, more or less, in depth, and the said conveyance being made by order of the Court of Chancery), the following piece of land, in consideration of

£150, was conveyed to the said John Higgins, in fee simple, viz., part of the west part of lot No. 8, on the north side of Richmond Street, commencing on the east side of York Street at a point sixty-four feet southerly from the southern limit of Queen Street, then easterly, parallel to Queen Street, eighty-two feet; then southerly, parallel to York Street, twenty feet, then westerly, parallel to Queen Street, eighty-two feet, more or less, to York Street, then northerly along the east side of York Street twenty feet, to the place of beginning.

Higgins and wife, by deed of bargain and sale, dated the 31st of October, 1853, conveyed the same piece of land, by the same description, to William Cook, in fee, consideration £162.

On the 30th of March, 1854, William Cook and wife, in consideration of £250, conveyed the same premises by same description to plaintiff, being twenty feet on York Street by eighty-two feet deep.

On the trial the defendant offered evidence to shew that he and those under whom he claims have been in possession of the land since 1832, and contended that the plaintiffs claim was barred by the Statute of Limitations.

The plaintiff contended that the Statute of Limitations did not run, as Sarah Long, who had a life estate in the land, only died, as was shewn at the trial, a few months before: that the conveyance from David and Sarah Long to James Long, registered in 1848, was voluntary as to David, and could only convey the life estate of Sarah, inasmuch as David had by a subsequent conveyance for value, in 1844, conveyed the residue of his estate to Jared Banks.

It was objected that the deed from David and Sarah Long to James, if produced, might shew a further consideration beyond that expressed in the memorial, and that as by the registry law it was not necessary to state the consideration in the memorial, that the consideration mentioned should not be taken to be all the consideration, there might be covenants in the deed to support Sarah Long. One witness proved that he had applied to Banks, who owned part of the lot mentioned in the deed from Sarah and David to James Long,

and also to Mr. Crickmore, who had been solicitor for some of the parties. Willis Addison, the administrator of James Long, stated he had not found this deed amongst the papers of the intestate. Notice to produce the deed served.

As to the consideration for the deed from David Long to Jared Banks, dated the 21st of May, 1844, Mr. Gamble said that some money was paid, whether £10 or \$10 he could not tell, but bank bills were passed; David Long said, that the consideration, £200, would be made up and more if all that Banks had done for him were put together; the observation was made because Mr. Gamble had remarked on the smallness of the sum paid in contrast with the consideration expressed, £200.

In Michaelmas Term last, *James Boulton* obtained a rule calling on plaintiff to shew cause why the verdict should not be set aside, and a new trial had on the grounds—

First.—That the learned judge who tried the cause should not have permitted secondary evidence of the deed from Sarah and David Long to James Long, no sufficient search having been made for the original.

Second.—That defendant, and those under whom he claims, had been in possession more than twenty-five years, claiming under a conveyance.

Third.—There was no evidence of the death of Sarah Long before commencement of suit.

Forth.—And on the ground that there was a valid consideration for the first deed, the support of Sarah Long; and that James did support her until his death, and his widow did so since.

In Hilary Term, *Leith* shewrd cause, and contended there was no merger of the life estate of Sarah Long, by the conveyance by her and David to James, that the estates remained separated, and that James and those claiming under him could, during the lifetime of Sarah have set up her estate to defeat the claim of the remainder man.

That the subsequent conveyance by David, for a valuable consideration, made his first conveyance fraudulent and void, and that after the death of Sarah, those who held under Jared Banks were entitled to recover, no matter how long the land may have been in possession of another. He further



contended that sufficient search had been made for the deed from Sarah and David Long, to let in secondary evidence of its contents, as a notice to produce had been given. He referred to *Doe Otley v. Manning*, 9 East, 59; *Gale v. Williamson*, 8 M. & W. 405; *Connell et al. v. Cheney*, 1 U. C. 307; *White v. Manning*, 13 U. C. 640

*James Boulton*, contra, contended when the life estate and the estate in remainder, both vested in the same person, the former was merged in the latter. He contended that the deed from Sarah and David Long should have been produced, and that he would shew that there had been a valuable consideration passed for it, and referred to the affidavits. He referred to *Patulo v. Boyington*, 4 U. C. C. P. 125.

*Leith* also filed affidavits to shew that Sarah Long had not been supported by James Long and his widow as was contended.

RICHARDS, J., delivered the judgment of the court.

We are of opinion that the life estate of Sarah Long did not merge in the remainder by the conveyance by her and David to James Long. In *Preston on Merger* (vol. 3 of his *Conveyancing*) it is laid down at page 437, "There will not be any merger when several persons, who are owners of distinct estates, join in conveying these estates by one and the same conveyance, and by the same limitation." At page 441, it is stated, "When two persons, each having a several estate expectant on the other, convey the land in which they have those estates to one person by the same conveyance, though the estates will be consolidated, and no longer distinct, yet the land may be held under this conveyance until such time as both the estates would have severally determined if they had continued in the tenancy of distinct persons—*Treport's* case, 6 Reports; 3 *Coke's Reports*, 285; and *Bredon's* case, referred to in *Symonds v. Cudmore*, *ib.* 1 *Salk.* 338.

If then the life estate of Sarah Long was not merged, it remained outstanding and the statute could not run against the remainder man until her death. In *Lynch v.*

O'Hara, this court decided that secondary evidence, by production of memorials, was admissible in a similar case to this.

We do not think the facts of this case were investigated in such a way as to enable us to decide in a satisfactory manner, whether the deed from David Long to James Long, in which he was joined by his mother, was voluntary or not. The authorities go to the extent of shewing that the second deed must be for such adequate consideration as to show it was not fraudulent. In the last edition, 1857, of Sugden on Vendors and Purchasers, page 587, it is laid down that to take advantage of 27th Eliz., ch. 4, a person must have purchased *bona fide* and for a valuable consideration, which must not be so small as to be palpably fraudulent.

The evidence does not show that kind of consideration for the second deed, which would always be considered as satisfactory, and if any further evidence of its adequacy can be given it would be as well to produce it. The defendant may also shew a valuable consideration for the first deed, as it is expressed to be for a money consideration as well as natural love and affection. The two questions may then be left to the jury, whether the first deed was for a valuable consideration or merely voluntary, and whether the second deed was *bona fide* and for a valuable consideration. We think there should be a new trial, costs to abide the event.

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See Upton v. Bassett, Cro. El. 444; Newdom v. Bowmont, 3 Rep. 836; Doe Watson v. Routledge, Cowp. 705; Bullock v. Sadlier, Amb. 764; Hill v. Bishop of Ex. 2 Taunt. 69; Doe Parry v. James, 16 East 212; Doe Barnes v. Rowe, 4 Bing. N. C. 737; Jones v. Whittaker, 1 Low. & Low. 141; Doe Newman v. Rusham, 17 Q. B. 723. As to merger Treports case, 6 Reports, Earl of Clan. Hob. 273; Cruise, vol. 6, 488-9, 491-2-3; Hasker v. Sutton, 1 Bing. 500; Doe Harris v. Howell, 10 B. & C. 191.

The CHIEF JUSTICE took part in the remaining judgments of the term.

## CANNIFF V. BOGERT.

*Replevin—Irregular proceedings—Breach of Agreement.*

Two writs of replevin were sued out by the plaintiff against the defendant, one in the *Court of Queen's Bench* for lumber, situate on the *east* side of the river Moira, the other in this court for lumber on the *west* side, and both records were entered for trial at the same assizes at Belleville; one cause was tried, the evidence given at the trial relating to the lumber on the *east* side of the river; but the verdict was recorded on the record in this court. A new trial was moved for and obtained on that verdict subsequently. (See 5 U. C. C. P. 341.) An agreement was then entered into by which the subject matter in dispute in this action was settled.

Plaintiff then gives another notice of trial, but finds out his mistake and does not enter the record. Defendant's attorney however makes up a record and enters it, and when the cause is called on defendant's counsel appearing, and no one being present for plaintiff, he is nonsuited. The court upon application set aside the nonsuit without costs. The matters in dispute having been settled by agreement they could not again be litigated without waiving or annulling that agreement.

N. B. A judgment was published in this cause in Hilary Term last, (see 6 U. C. C. P. 474) by inadvertence of the reporter, the same never having been delivered, this being in fact the decision.

REPLEVIN. The case came before the court in Michaelmas Term last, when a rule was obtained by *Walbridge* for the plaintiff to set aside the nonsuit with costs, and to stay proceedings; the cause having been settled by agreement between the parties. He filed various affidavits and papers, by which it appeared that the writ of replevin was issued on the 2nd of September, 1854, commanding the replevy to the plaintiff of thirty-three piles and pieces of white pine plank and boards, marked with a wheel and blue paint, lying on the *west* side of the river Moira, at Canniff's mills, in the County of Hastings, containing by admeasurement about 170,000 feet. The sheriff replevied, and delivered that lumber to the plaintiff. The plaintiff declared, and the defendant pleaded *non cepit*, a denial of plaintiff's property, and an assertion that the property belonged to defendant.

The plaintiff had previously, on the 13th of July, 1854, sued out a writ of replevin from the Court of Queen's Bench against this defendant, under which a quantity of sawed lumber lying on the *east* side of the River Moira was replevied and delivered to the plaintiff. The plaintiff declared, and the defendant pleaded in that suit also; and both

causes being at issue were entered for trial at the assizes at Belleville, in April, 1855. One of these causes was called on, and the evidence relating to the lumber on the east side of the River Moira was given, and the jury upon that evidence gave a verdict for the plaintiff. The verdict was entered however upon the record of *nisi prius* from this court. In Easter Term following a new trial was moved for and granted by the court. (See the report in 5 C. P. U. C. 341.) Counsel for defendant moved, and counsel for plaintiff answered the rule.

After that verdict had been rendered on the 23rd of April, 1855, one Stephen Clark, for whom the defendant had been acting, made an agreement (drawn by defendant's attorney) with the plaintiff, by which, in consideration that he Clark, should pay the plaintiff's costs in an action of replevin "now entered for trial and not yet tried," between plaintiff and defendant, plaintiff agreed to hand over to Clark or his agent, "all the sawed lumber now on the west side of the River Moira, cut out of certain logs sold by said Canniff to one H. Colebourne" The defendant was a subscribing witness to this agreement, and by a memorandum endorsed thereon, Clark authorised him to take the delivery of that lumber as his agent from plaintiff. On the 24th of April, 1856, plaintiff served a notice addressed to Clark, on defendant's attorney, to take away this lumber. The plaintiff swears that he then considered both suits were settled: that relating to the lumber on the west side of the river, by this agreement with Clark, and that relating to the lumber on the east side by the trial and verdict, and that he never understood to the contrary until a few days before the autumn assizes, 1856; and that defendant was agent for Clark in both suits.

Soon after the agreement of April, 1855, the plaintiff and defendant went to the west side of the Moira to deliver the lumber. By the agreement such lumber was to be pointed out by Messrs. Fuller and Barnes; but they refused to point it out, unless Clark, or defendant for him, would pay for the sawing which had been ordered by one Bickford, a partner or agent of Colbourne. The defendant refused to make this payment.



That afterwards, and to enable plaintiff to remove some lumber of his own, Fuller and Barnes did point it out, and plaintiff removed his own, left the other for Clark, and served the notice of the 20th of April, 1856.

That Clark's title to this lumber was derived under a sheriff's sale on an execution Clark and Colbourne, the defendant buying as Clark's agent. Plaintiff claimed the lumber, insisting that he had not yet parted with it to Colbourne.

That Clark, after the agreement of April, 1855, was signed, told plaintiff he was satisfied plaintiff was the true owner of that lumber, that the verdict then given was correct, and that he never intended further to litigate the matter.

Plaintiff also swears he never would have signed that agreement acknowledging Clark's right to the lumber on the west side of the river, but on the condition that the lumber on the east side was allowed to remain his (plaintiff's) property, that lumber being sufficient to satisfy all claims of plaintiff on Colbourne: that defendants attorney held the agreement, and only gave plaintiff a copy of it about August, 1856.

It was sworn by the partner of the plaintiff's attorney, that he did not discover the error made in entering the verdict on the record issued from this court, until after notice of trial had been given in this cause: that consequently the record was not entered, but defendant entered the issue book, which was altered and made into a record; and as the plaintiff's counsel considered that suit at an end by the agreement, he did not appear, and plaintiff was nonsuited.

There are three affidavits properly entitled filed for defendant; they agree with the plaintiff's statement that all the facts which were given in evidence at the trial in April, 1855, related to the lumber on the *east* side of the river, confirming the statement that all parties supposed they were trying that question, and not one affecting the lumber on the *west* side of the river. They deny unequivocally that the arrangement made, which appears in the agreement of the 24th of April, had any relation to, or was meant to affect the suit or the claim for the lumber on the *east* side of the river.

There are two other affidavits, also filed for defendant. On looking at them they are both entitled in the Queen's

Bench, and were sworn in reference to that cause, but were used by consent of the plaintiff's counsel on this occasion. They do not materially affect the preceding statements, except so far as they deny any understanding that the settlement of the case relating to the lumber on the *west* side of the river Moira, was not understood by the deponents to be intended to affect the suit respecting that on the *east* side, or to interfere with the proceedings respecting this last mentioned lumber.

In Hilary Term *Walbridge* moved the rule *nisi* absolute.

*Bell*, of Belleville, shewed cause, citing *Moore v. Bowmaker*, 6 Taunt. 379, and 7 Taunt. 98.

*Walbridge*, in support of rule, cited *Hallett v. Mountstephen*, 2 Dow. & R. 343 ; *Donelly v. Dunn*, 2 B. & P. 45.

DRAPER, C. J., delivered the judgment of the court.

Both parties in the cause have been acting in error.

It may have been, and most probably was the case, that at the assizes in April, 1855, the record of *nisi prius*, in the cause in this court, was the one handed up to the learned judge, and that the jury were sworn to try the issue joined on that record. The plaintiff's counsel in argument, seemed to insist that the error only arose from an accidental endorsement of the verdict on the wrong record. If this had been so, and the jury were actually sworn in the cause instituted in the Queen's Bench ; then as the evidence given all related to the matters in issue in that cause, the learned judge who tried it might possibly, upon application, have set all right. But the mistake was not then discovered ; so far from it, the facts proved were assumed on both sides to relate to the cause in this court, and in that belief, and as the verdict for the plaintiff was entered on that record, a new trial was moved for by defendant and was granted in this cause. It is not as if there had been a mutual agreement between the parties to let things go on without regard to the mistake ; both parties, on the contrary, acted in the belief all was right.

In fact, the matters in dispute in this cause have never been investigated, and the parties by the agreement of the 24th of April, 1855, evidently never meant they should be. The cause in which those matters were involved was to be stayed, and Clark, whose agent the defendant is, was to pay the costs.

Under the same error, the plaintiff gave notice of trial in this cause, as if it related to the lumber on the *east* side of the river. He at last discovers his mistake, and consequently does not enter the record of *nisi prius*, and informs the defendant's attorney on the morning of the first day of the assizes that he does not mean to do so. The defendant thereupon hastily makes up a record of *nisi prius*, enters it, and when the cause is called, the defendant's counsel appearing and no one answering for plaintiff, a nonsuit is entered as of course.

I have no doubt the defendant's proceeding was irregular, for though in the action of replevin the defendant might enter the *nisi prius* record without proviso, he was bound to give notice of trial, which he does not pretend to have done. For want of this notice the nonsuit was clearly irregular. That objection is, however, with the same absence of considering what they were about, which has marked the proceedings on both sides, entirely overlooked, and we are applied to on the ground that the proceeding was contrary to the agreement of April, 1855.

Looking at the affidavits on both sides, it is now clear that on the record of *nisi prius* in the cause in this court, the only matters of fact which could have been tried, were those relating to the lumber on the *west* side of the river: that these matters were intended by the parties on both sides to be settled by the agreement of April, 1855, and that they could not be entered into without waiving or annulling that agreement. To enter the record, therefore, was on either side contrary to the intention of the agreement, and if so the nonsuit ought not to stand. It is intimated that the agreement has not been fulfilled, and each party endeavours to throw the blame on his opponent. But we are not to be called on to try that question on these affidavits; we must treat it as still subsisting, and if so it stays the proceedings respecting the lumber on the *west* side of the Moira, those involved in this action. The rule must be made absolute to set aside the nonsuit without costs.

Rule absolute without costs.

## GERMAIN ET UX. V. SHUERT.

*Dower—Evidence—Pleading—Amendment.*

The defendant in an action of dower pleaded *ne unques seizie que dower*, and after trial and verdict against him remembered that a bond had been executed by himself and the demandant several years before, providing for the release of the dower in question, which bond had remained in the hands of a third party, and not been produced at the trial.

The court granted a new trial on payment of costs, with leave to add a plea.

DOWER claimed by Christiana Germain in right of her former husband, Joseph Shuert, deceased, out of lot No. 4, 1st concession of Beverley.

Plea—*Ne unques seisie que dower*.

The trial took place at Hamilton, in March last, before *Burns, J.* There was no pretext for the defence set up by the plea, for it was very clearly proved that the land had been duly conveyed to demandant's husband upwards of thirty years ago. The land having come to the defendant by some arrangement not proved at the trial, he (under a mistake not uncommon among ignorant people in this country) prevailed on the original grantor to back back the deed given to his (defendant's) father, the demandant's husband, and which had never been registered, and to give a new deed to him, assuring the grantor that this arrangement met with the concurrence of all the family. Possibly the plea was pleaded in ignorance of the real facts, and supposing that the defendant's seisin was derived from the deed to himself. The requisite demand of dower was proved, and there was no question for the jury but the damages for the detention, and for these the jury gave £100, a sum not extravagant upon the evidence, and which is not advanced as a subject of complaint against the verdict.

But in Easter Term *O'Riilly, Q. C.*, obtained a rule *nisi* for a new trial on affidavit, setting forth, that the defendant had given a bond dated 9th March, 1846, to demandant, and which she had sealed as well as himself. The recital in the condition shewed an agreement among the widow (the demandant) and children of Joseph Shuert, who had recently died intestate, to settle the affairs of the estate in accordance with the expressed wishes of the deceased, and that it had been covenanted by defendant, that in consideration



of a conveyance made by the eldest son and heir of deceased of the land in question to defendant, and of the interest in said lot, "now possessed by his, the said Joseph Shuert's mother, one of the party to these presents, by her claim of dower therein," that defendant should do certain acts for the benefit of his brothers, which it was recited he had performed, and proceeded to state that "for the claim" of his mother "*as dower*" on said property, and of his sister's claims, he undertook and agreed for the considerations aforesaid, and for the further consideration of 5s., paid by his mother, to maintain them during their lives, so long as they might remain single, and choose to make defendant's house their home. And the condition was that defendant should perform the matters set forth in the recital.

The defendant's attorney swore that the defendant did not inform him of the existence of the bond, nor was he aware of the contents of the same when he was employed to defend, nor was he made aware of the contents until too late to be of service on the trial, and did not know its nature until 1st of June last, when he read a copy of it.

The tenant swears that when he employed his attorney he had forgotten the contents of the bond, and that demandant was a party to it, and did not mention it to him. That the bond had been left in the hands of Thomas Racey, Esq., for safe keeping, which statement Mr. Racey, the subscribing witness to it, confirms. That he did not discover the bond, or become aware of its contents, until two weeks after the trial.

*Duggan* shewed cause on affidavit. One of the demandants' attorney shewing by the declaration of defendant's attorney, that he was aware of the existence of the bond, and that defendant spoke to him concerning the bond before the trial I gathered from this affidavit that these conversations took place during the assizes. This meets the defendant's assertion of ignorance prior to the trial, but does not shew that the defendant's attorney acquired the knowledge in sufficient time to have used it for any practical purpose at the last trial. He also put in an affidavit of the demandant not denying the bond, but asserting the intention of the parties

was only that as long as defendant fulfilled his undertaking she should not advance her claim for dower, and then stating that she had, with her daughters, been obliged to leave defendant's house owing to his breach of his agreement as to their maintenance, and therefore claiming now a right to go back to her original rights.

DRAPER, C. J., delivered the judgment of the court. (a)

I gather from the demandant's affidavit that she left defendant's house about six years after the death of her husband, and she states that her husband died about sixteen years ago. This would bring her departure to the year 1847, and yet the bond is dated in March, 1846, and if I understand her statements rightly, it could not have been given till five years after her husband's death. At the trial a witness swore the husband died eight or nine years ago, which seems more consistent with the other facts.

It is observable that the condition of the bond is to maintain demandant and her daughters so long as they may remain single. It is not stated at what date the demandant contracted her second marriage.

I cannot help observing that there has been great negligence on the part of the defence. Either the defendant omitted to give proper instructions to his attorney, or the attorney omitted to make proper enquiries. The fact that the bond was all the time left in Mr. Racey's possession affords some explanation, but not a satisfactory one, of its being overlooked. The pleadings certainly would not have admitted this defence; and on the evidence given at the trial it is difficult to understand why *ne unques seisie* was pleaded, if the defendant had instructed the attorney as to the real facts.

I feel great difficulty in granting a new trial where there has been such culpable indifference in ascertaining and bringing out the real facts of the case, and when I cannot help thinking the deed to the defendant himself, and the surrender of the deed to his father, arose from an expect-

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(a) See *Thomas v. Cook*, 2 B. & A. 119; *Grimman v. Legge* 8 B. & C. 324; *In re Harris*, 6 A. & E. 475; *Freeman v. Cooke*, 2 Ex. 654; *Edwards v. Bailey*, Cowper 597.

tation that all claim on demandant's part would be effectually cut out, though, perhaps, as the second deed was given two or three years after the father's death, it may have been otherwise

On the other hand, if the demandant really has executed an instrument, which if not a formal release, would nevertheless operate to bar her setting up her present claim, it would be unjust to let this verdict (a judgment on which would bind the right) prevail. It is true her affidavit contains strong statements against the tenant's assertions, but they must not be taken as conclusive merely on her own affidavit.

On the whole, I think it will be the best course to grant a new trial on payment of costs, with leave to the tenant to add a plea, such as he may be advised, to bring up this defence: costs to be paid and new plea pleaded on or before the 1st of October.

*Per Cur.*—Rule absolute.

### ROGERS ET AL. V. CARD.

#### *Evidence—Admissions—Notice to produce.*

In an action of ejectment, the point in dispute was whether T. R., one of the plaintiffs, had ever conveyed the premises in question to one J. R., deceased, (under whom the defendant derived title,) evidence was given of conversations in which T. R. had stated either that he had given a deed to J. R., of the property in question, or that all the title to it was vested in J. R., and a letter from T. R. was also produced referring to such a deed, but no strictly legal evidence was given of the contents of such deed.

*Held*, That such evidence under the circumstances was admissible on the part of the defendants as primary evidence, and that notice to the plaintiffs to produce such deed was unnecessary.

EJECTMENT for No. 7, broken front, concession A., township of Haldimand. Defence limited to a part containing nine acres. The plaintiff Timothy claimed title to the land under and from the late James Rogers, who derived his title from the grantee of the crown. The tenant claimed as tenant at will to one Ira D. Card, who was the lessee of the said James Rogers. The case was tried in March last at Cobourg; before *Hagarty, J.*

The title was admitted down to Timothy Rogers, and a deed from him to the plaintiff, Anne, dated 20th October, 1856, for a consideration of 5s. was proved.

On the defence was proved a lease bearing date 21st February, 1849, made between James Rogers of the first part and Ira D. Card of the second part, whereby James Rogers demised to Ira D. Card part of the east half of lot No. 7, broken front, concession A., containing nine acres habendum for twenty years from date, at a yearly rent of £15. On this is endorsed a receipt dated the 21st of February, 1854, "for the rent on the within lease up to this date," and signed by the plaintiff Anne Rogers. A notice was admitted to produce a deed from plaintiff Timothy to James Rogers, but it was not produced. Three witnesses were called, all of whom spoke to conversations in which Timothy Rogers either stated he had given a deed to James Rogers of the east half of this lot No. 7, or the title to it was vested in James; if any body could make title, James could. None of them had ever seen any such deed, but Timothy had represented that it was agreed between him and James it was not to be recorded, nor was he to sell during his mother's life, whom he was to maintain. It was also sworn that Timothy Rogers had expressed regret at the lease being given by James Rogers to Ira D. Card, and pointing to the lessee's buildings, &c., had said, he would not have let them be erected. It was shewn Card had expended two or three thousand dollars in mill, machinery, shops, &c. The defendant also put in and proved a bond dated the 1st of July, 1850, from Timothy Rogers to the defendant, in a penalty of £250, conditioned that upon certain payments being made he would convey to defendant the northernmost 100 acres of No. 5, 2nd concession of Haldimand, in fee.

A witness named William Mail swore that in 1835 he witnessed a writing which he understood was a deed between Timothy and James Rogers: that he was certain it had no seals attached to it: that about three weeks before James Rogers's death this witness spoke to him about registering his deed, when James Rogers said he had no deed. The witness said he had told people he had witnessed a deed of the east half of the lot in question from Timothy to James Rogers.

It further appeared that Timothy Rogers had gone to



California many years ago; that he returned again and was in Canada in 1850; and went again to California, where he was still supposed to be. A letter from him dated San Francisco, 27th of August, 1853, was put in by defendant; being produced by the plaintiff on being asked for. It contains the following passage: "As it respects the death of our beloved brother James. it was always an understanding between him and me, that he should not put his deed on record unless he should find it absolutely necessary for his support, and it was this condition that made him delay or decline getting it recorded. There were several considerations that led us to adopt this arrangement, and one was the very mournful occasion that has happened; if he (James) should die the title would then return to me, where he most desired that it should, and it seems to me that we ought to have our own agreement carried out. We always had the most friendly and brotherly feeling on all these matters, placing implicit confidence in each other, which made it quite unnecessary for our own security to make any writings on the subject. As it regards the claims of Mr. Card for the part that he has rented, I of course should expect to make good, his lease, on his giving up the old one, I would give him a lease myself. Our brother and me never had the most distant idea of any wrong to any one, but we wished to keep the property among ourselves. You write me that your counsel told you that he would have to look for the heirs of our beloved brother, but I do not think that any other but brothers and sisters could be sought for: if so it will not divert the property from its proper course; but I do not see as the law need compel us to take the course your counsel mentioned you, as long as there is no one out of the family that is interested."

For the plaintiff, in reply, it was proved that James Rogers died, in 1853, unmarried, and in consequence of some observations of Card about his lease and the necessity of James's deed being registered, a search was made among his papers, and a deed was found from Timothy to James Rogers, dated the 31st of December, 1836, which was supposed to be for the east half of lot No. 7, concession A., but on subsequent ex-

amination it turned out to be for a part of lot No. 5, 2nd concession of Haldimand, containing fifty acres, and being in fact the north-west quarter of that lot in fee; no other deed was found. On a search through Timothy's papers, one was found with Mail's name to it without seals, apparently such a paper as he had spoken of, but it was thought of no consequence and was put aside, and cannot now be found, nor can any evidence be given of its contents. Under the impression that the deed of 31st of December, 1836, was for part of lot No. 7 a letter was written by some of the family to Timothy, which produced the letter of the 27th of August, 1853, in reply. A power of attorney was produced and received in evidence, dated the 2nd of September, 1856, whereby Timothy Rogers authorised James G. Rogers to act as his attorney, and among other things to "grant a lease to one Ira D. Card, of Haldimand, aforesaid," for a portion of the lot in question, "upon the same terms (or other terms if they shall so agree) as those contained in a lease made to him by my deceased brother, James Rogers, which I do not desire to question if the said Card will pay and satisfy all arrears of rent according to said lease, and otherwise perform his agreements therein contained.

On this evidence the jury found for defendant.

In Easter Term, *Galt* obtained a rule *nisi* for a new trial on the law and evidence, for the admission of improper evidence, and for misdirection, insisting there was no legal proof to go to the jury that Timothy Rogers had executed any deed of the land to his brother James; or if there was evidence of some deed, no legal proof being given of its contents, there was in law a presumption that it conveyed at most an estate for life; and upon an affidavit of the plaintiff Anne Rogers that she was the real owner of the land, but that her brother Timothy was also made a plaintiff in order to avoid the necessity of proving the execution of a deed from him to her, such deed having been executed under a power of attorney sent by Timothy from California: that Timothy would, she believed, return to this province from California by the next assizes. and that he had written so, and that she

verily believe no conveyance was made by him to their deceased brother James as was set up at the trial.

In the following term *Armour* shewed cause, he filed several affidavits in reply, setting forth admissions by the plaintiff before the date of her deed from Timothy, and statements by James Rogers in his life time ; that he (James) had a deed for, or owned the east half of this lot No. 7, concession A., in Haldimand, in fee simple ; and affirming the evidence as to this deed which was given at the trial, and shewing that a James Rogers at the general election for 1847, (in December,) voted, giving this lot (east half of lot No. 7, concession A.,) as his qualification ; he also referred to *Doe Lowden v Watson*, 2 Starkie's cases, 230.

DRAPER, C. J., delivered the judgment of the court. (a)

The objection to the learned judge's charge was, that he left to the jury to say on the evidence was there any conveyance ever executed intended to pass and passing the estate in fee simple, in this land, from Timothy to James Rogers. The jury were told what solemnities were requisite for the execution of a deed to pass real estate : that the land could not pass without a deed containing apt words ; and that no witness professed ever to have seen any such deed or to prove its actual contents.

The objection to the finding of the jury seems to resolve itself to this : that taking the whole evidence together they should not have found that Timothy Rogers ever conveyed this land to James.

The circumstances are strange. During the life of James Rogers every member of his family concurs in treating him as the owner in fee. His own acts and declarations (no objection is raised to the admissibility of the latter) are unequivocal assertions of ownership. One of his brothers, since dead, is a witness to the lease. His sister, one of the plaintiffs, receives rent on the lease after his death, though

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(a) See *Slatterie v. Pooley*, 6 M. & W. 664 ; *Howard v. Smith*, 3 M. & Gr. 254 ; *Earle v. Picken*, 5 C. & P. 542 ; *Bloxum v. Elsee*, 1 C & P. 558 ; *Sewell v. Stubbs*, 1 C. & P. 73 ; *Doe v. Miles*, 1 Starkie Ca. 181 ; *Doe Lowden v. Watson*, 2 Starkie Ca. 230 ; *Alderson v. Clay*, 1 Starkie's Ca. 405 ; *Harvey v. Kay*, 9 B. & C. 356 ; *Ashmore v. Hardy*, 7 C. & P. 504 ; *Dickinson v. Coward*, 1 B. & Al. 677 ; *Boulter v. Peplow*, 9 C. B. 493.

before she obtained her conveyance. The other plaintiff, Timothy, speaks and writes in terms shewing that he knew James had given this lease, and at least not questioning his full power to do so. In short, among them all, there seems to have existed no doubt whatever but that James was the owner of the premises by a conveyance granted to him by Timothy, until after James's death, and until upon search a deed was found by which Timothy, as long ago as 31st of December, 1836, had conveyed in fee to his brother James the north-west quarter of lot No. 5, 2nd concession of Hal-dimand, fifty acres.

This deed appears to be witnessed by two of the brothers, both of whom are since dead. Even as to this land, we find that on the 1st of July, 1850, and in James's life time, Timothy Rogers gives a bond to sell and convey to a third party. A paper unsealed, was proved by a subscribing witness to have been executed by the two brothers, he imagined it to be a deed, though certain it had no seals. A paper answering his description witnessed by him is found after James Rogers's death, when a search for the alleged deed was made; but the only person then present (a sister of the Rogers) did not read it; and neither she nor the subscribing witness can state any thing of its contents, only it seems certain it was no deed. If, therefore, the only question was whether a new trial should be granted on the evidence, assuming it properly admitted, or on the affidavit of the plaintiff Anne, I think the rule should be discharged. The plaintiffs, or either of them, could bring a new ejectment and supply such further proof and explanation as would destroy the effect of their own declarations, acts and conduct, in relation to this property and the ownership thereof. But on a case so doubtful as this, and the doubts principally arising from the conduct of the plaintiff Timothy, and his recognition of the acts of his deceased brother James, I should not feel inclined to give a second trial as against a tenant who seems to have acted in perfect good faith, and who has expended large sums of money in improving the estate, relying upon the validity of his lease.

Then comes the legal question. The notice to produce



called for "a certain deed or conveyance from the plaintiff Timothy Rogers to his brother James Rogers of the east half of lot No. 7, concession A., township of Haldimand." The object of that notice was to lay the foundation for the admission of secondary evidence. Then the next step would have been to prove the existence at some time or other of such a document; then to prove that it was in the plaintiff's possession or under his control, and then to give evidence of its contents, by a copy, or by the recollection of some person who had seen and read it. In the present case, no presumption would arise from the character of the instrument that it was in the possession of either of the plaintiffs. A deed to James Rogers would not probably remain in the hands of the grantor; it would in the ordinary course of things be in the possession of the grantee; but during the trial a search among his papers was proved, and that no such deed was found, though a deed supposed, until examined, to answer the description in the notice, was discovered and was produced. Assuming all this to be sufficient for the admission of secondary evidence, no such evidence was in reality given, or if any, it was of a slight inefficient character.

The defendant relied upon the admissions of the plaintiff, or rather of one of them, to prove both the existence of such a deed and of its contents, and such evidence, if admissible at all, is primary evidence, and does not depend for admissibility on a notice to produce.

That such admission could not have been rejected unless by expressly overruling the authority of *Slatterie v. Pooley*, is clear; for that case goes the whole length of determining that such admissions are primary evidence against the party making them and those claiming under him, although they relate to the contents of a deed which is directly in issue in the cause, and this case, as is said by *Maule, J.*, in *Boulter v. Peplow* (9 C. B. 493), has frequently been recognised and acted upon. — The case of *Lawless v. Queale* (8 Ir. Law R. 382), which Mr. Taylor refers to in section 383 of his *Treatise on Evidence*, and in which Chief Justice *Pennefather* strongly dissents from the doctrine of *Slatterie v. Pooley*, was brought under the notice of the Court of Common Pleas in *Boulton v. Peplow*; but elicited no corresponding opinion;

and indeed *Williams, J.*, says: "It is impossible for us to overrule *Slatterie v. Pooley*, though we may think the *reasoning* not quite satisfactory."

The present case indeed is not open to the objection that the admission rests exclusively on the evidence of what a witness says he heard Timothy Rogers, the alleged grantor, say respecting his having given a deed to James; for the letter written by Timothy on the 27th of August, 1853, tends strongly to corroborate the parol proof of admission, and so do some expressions in the power of attorney under which the deed to the plaintiff Anne was executed.

I think, therefore, that the evidence was admissible, and was properly left to the jury to consider as to its effect. The charge is not, I think, open to the particular exception, that the jury should have been told that if they found Timothy Rogers had executed some deed to James, they should presume it only conveyed a life estate. For several of the expressions proved to have been used by Timothy go much further, as where he said to an intending purchaser of part, "all the title there is, is in James, if any body could make title James could; James is a fool to sell it:" all tend to the admission of a title in fee, and were properly left to the jury as such. The terms of the admissions made by Timothy are sufficient to exclude any presumption of no more than a life estate passing, if such presumption would otherwise have arisen in this case.

On the whole I think the rule should be discharged.

Rule discharged.

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### THE CITY BANK v. STRONG AND PHIPPS.

#### *Commission—Nonsuit—Evidence.*

This was an action on a promissory note; defendant Strong the first endorser, let judgment go by default. Phipps, the second endorser, pleaded did not endorse. The evidence as to endorsement by Phipps was conflicting, but a commission upon which witnesses had been examined, and among others, the makers of the note, on being opened, was found to be informal and could not be read. The plaintiffs, notwithstanding, preferred going to the jury to taking a nonsuit.

Under the circumstances the court discharged a rule *nisi* for a new trial, which had been granted on the law and weight of evidence.

This was an action on a promissory note made by Kermott & Co., dated 15th April, 1856, for £500, payable to defen-

dant Strong, or order, and endorsed by him to defendant Phipps, who was sued as a second endorser. Strong let judgment go by default, and Phipps pleaded a denial of his endorsement

The case was tried at Toronto, before the Chief Justice of Upper Canada, in May last. There was very conflicting evidence as to whether the endorsement of defendant Phipps' name was genuine or not. Many witnesses were examined, and same facts proved, on either side, independently of the belief of the witness as to the handwriting. A commission was produced by the plaintiff, on which, as was stated, Kermott, the maker of the note, who had removed to the United States, had been examined, but for the want of a proper affidavit of the due execution of the commission the interrogatories and answers could not be read. The learned Chief Justice left the case to the jury as one peculiarly for their decision, abstaining from stating what impressions the evidence had made on his own mind. They found for the defendant.

In Easter Term *Galt* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and the weight of evidence, and on the ground of surprise owing to the defective execution of the commission, or for leave to enter a nonsuit as to the defendant Paul Phipps.

In the following term *M. C. Cameron* shewed cause. He contended that the case having been properly left to the jury when it might be said the evidence was so conflicting that a verdict either way might be sustained, the court should not grant a new trial. No leave was reserved to move for a nonsuit, and that part of the application must therefore fail, and he remarked that there was no affidavit to support the motion for a new trial.

DRAPER, C. J.—I think that we ought not to interfere with the verdict on the ground that it is against evidence. In a question of this description peculiarly within the province of the jury and property left to them, the rule is thus laid down by *Tindal, C. J.*, in *Belcher v. Prittie* (10 Bing. 414), “When a case involves not matter of law, but that which is purely a

a question of fact, and that fact has been submitted to those whom the law has constituted the *judicis facti*, we are not at liberty to take away from the party the right which he has acquired from the mouth of the jury, though we may entertain some degree of doubt whether they have come to a right conclusion. Before we send the party down again we ought to perceive, if not with moral certainty, at least with a degree of clearness approaching to it, that the jury have done wrong." Every word cited of this judgment is applicable to the present case. (a)

I have felt more hesitation on the ground of surprise, as the plaintiff's counsel could not have discovered the defect in the commission till after the jury were sworn. But he exercised his election to go to the jury upon the other evidence which he had, instead of submitting to a nonsuit. And now no affidavit is made from which we can gather that any testimony to be adduced on a second trial will be other, or stronger for the plaintiffs than has already been received.

I should readily concur in ordering a nonsuit, but no leave was reserved, and the plaintiff had lost the option by going to the jury and receiving their verdict. The court in banc, cannot, I apprehend, make such a rule unless by consent.

I think the rule must be discharged.

*Per Cur.*—Rule discharged.

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### THE TRUST AND LOAN COMPANY OF UPPER CANADA V. THE CITY OF HAMILTON.

#### *Municipal debentures—Pleadings.*

The fact that a certain municipal debenture had been stolen previously to its being regularly issued. *Held*, no bar to the claim of a *bona fide* holder for valuable consideration, without notice.

A plea that such debenture was not issued "under the formalities required by law," because the by-law under which it was issued did not settle a special rate, and was therefore void. *Held* bad, for not averring distinctly that such debenture was issued in pursuance of a by-law; and for not pointing out wherein it was defective.

This case was argued on demurrer on the 3rd September, 1857.

Declaration 12th October, 1856, states that defendants,

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(a) *Commercial Bank v. Denison*, 1 Q. B. U. C. 13; *McLean v. Dittrick*, 7 Q. B. U. C. 144; *Robinson v. Rapelje*, 4 Q. B. U. C. 289; *Carstairs v. Stein*, 4 M. & S. 192.



on the 4th October, 1852, by their agreement or debenture sealed with the common seal, promised to pay to one John Kerby, or bearer, £750, eight years after date, and interest at the rate of 6 per cent., on the 4th of April and 4th of October, in every year. That plaintiffs are holders of the debenture for value, and that £112 10s. for interest is due and unpaid.

3rd plea. That the agreement or debenture was never issued by defendants: that it was drawn up and sealed for the purpose of being issued, but while in their possession for that purpose it was feloniously stolen by some person unknown, and transferred to plaintiff without the knowledge and assent of the defendants.

4th plea. That the agreement or debenture was not issued with the formalities required by law, for the by-law under which it was issued does not settle a special rate per annum to be levied in each year, and was therefore void in law.

Demurrer to 3rd plea—because defendants are innocent holders for valuable consideration, and without notice, and that defendants are stopped from denying they issued it.

Demurrer to 4th plea—it is not shewn to be necessary that there should have been any by-law to warrant the issue of the debenture, and that the by-law referred to should have been set out in the record.

The 16th Vic., ch. 80, sec. 1, enacts that any debenture theretofore or thereafter issued, under the formalities required by law, by any municipal or provisional municipal corporation, payable to any person named therein as bearer or payable to bearer, shall be held to have been and to be transferable by delivery from the time of the issue thereof, and such transfer shall be held to have vested, and to vest absolutely the property thereof in the holder for the time being, and to enable such holder to bring and to maintain an action thereupon in his own name.

Section 2, makes provision of a similar character, *mutatis mutandis* as to debentures issued payable to any person or order.

Section 3—In an action on any such debenture it shall not be necessary to set forth in the declaration or other pleading; or to prove the mode in which a party became

the holder of the debenture; or to set forth or prove the notices, by-laws, or other proceedings, on or by virtue whereof any debenture may have been issued, but it shall be sufficient in such pleadings to describe such person as the holder of the debenture, (alleging the general indorsation, if any,) and shortly to state its legal effect and purport, and to make proof accordingly.

Section 4—*Any such debenture issued under the formalities required by law as aforesaid shall be rated and recoverable to the full amount thereof, notwithstanding it may have been or be negotiated by such corporation at a rate less than par, or at a rate of interest greater than six per cent. per annum, and shall not be liable to be impeached in the hands of a bona fide holder for value, without notice.*

*A. Wilson*, Q. C., supported the demurrer.

*Eccles*, Q. C., contra.

DRAPER, C. J., delivered the judgment of the court.

As to the third plea.—Since the passing of the statute the right of a holder to recover on a debenture issued by a municipal council, and to declare as the plaintiff has here declared, is not open to dispute. Such debentures are choses in action transferrable by endorsement or delivery where made so, they become analogous to bills of exchange or promissory notes in many particulars, not in all, very probable. The question presented by this is, whether the fact that it was feloniously stolen from defendants and transferred to plaintiffs without the consent of defendants, shews as a conclusion of law that the defendants never issued the debenture. Each section of the act applied to debentures *issued* by municipal corporations under the formalities required by law. The plea does not rest on any supposed absence of these formalities, but it denies the issue of the debenture at all, by asserting that although duly drawn up and sealed for the purpose of being issued, it was feloniously stolen, and so not issued.

Now, in the first place, I think the same principles which apply to bank notes or promissory notes under precisely similar circumstances should govern this case. I can draw no solid distinction between them for this purpose. And if

a bank note or promissory note made payable to bearer, was duly signed and ready for issue, and in that state was stolen from the bank or makers, and came into the hands of a holder who paid full value and had no notice, I apprehend the maker would be liable upon it.

In *Rex v. Ranson* (2 Leach, 1090), the prisoner was indicted for stealing two promissory notes. These were notes which had been issued by the Tamworth Bank, payable at a banking house in London, where they had been presented and paid, and which had been put into a letter directed to the bankers at Tamworth, who, on receipt might, and in the usual course of business would, have re-issued them. It was insisted that under the circumstances these could not be considered as promissory notes: the money they were intended to secure having been paid, and the notes not having been registered pursuant to certain statutes, in one of which it was enacted that *after they should be re-issued* they should be as good and valid as they were upon the first issuing. A majority of the judges held that these notes, though not re-issued, retained the character and fell within the description of promissory notes and were *as promissory notes* valuable to the owners; and that the prisoner was properly convicted of stealing promissory notes.

In another case decided within the last twelve months (*Reg v. West*), the prisoner was indicted for stealing £95 in money, of the moneys, goods, and chattels of Robert Bell. The statute 14 & 15 Vic., ch. 100, sec. 18, enacts, "That in every indictment in which it shall be necessary to make an averment as to any money or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank notes simply as money." The facts were that the managers of a bank at B. inclosed in an envelope addressed to the manager at the same Bank at W. 19 bank £5 notes of the same bank issued at W., which had been paid into the branch at B. The bank did not re-issue at B. notes originally issued at any other branch, but transmitted them to the branch where they were originally issued to be there re-issued or otherwise disposed of. These notes came into the hands of the prisoner,

a clerk in the branch at W., and were appropriated by him. It was insisted they were not bank notes within the proper meaning of the term, not being at the time of the appropriation in circulation for value, but in the hands of the bankers themselves. The prisoner was convicted, but the case was reserved, and the judges, after hearing the prisoners counsel, affirmed the conviction (2 Jur. N. S. 1124). The principle of these cases would, I think, equally apply to municipal debentures; and the party who stole them from the defendants might be convicted on an indictment charging the larceny to be of debentures *eo nomine*, the property of the defendant. And I do not consider the doctrine as limited in its application to criminal offences, for if so, then the *bona fide* holders of the bank notes, which were stolen under circumstances such as the two cases I have cited disclose, would be without remedy to recover their value, and I have seen no case which affords the slightest foundation for such a conclusion. If, therefore, this be the true construction of the plea, I think it is bad.

But if the defence is that the defendants are not liable solely on the ground that the debenture was stolen, and so came to the hands of the plaintiffs, without the knowledge or consent of defendants; then the plea should go farther, and aver that plaintiff's are not *bona fide* holders for value, and without notice or knowledge of the felony. It seems to me the clear intention of the act, to make and to have an *ex post facto* operation in making their debentures current, enacting that delivery should give a perfect title to them, that they should possess this characteristic of promissory notes; and the result is that they can only be impeached in the hands of a holder on the same grounds as would apply to the holder of such notes, and in that view the plea is also bad.

The 4th plea is rested on the absence of a formality required by law to precede the legal issue of a debenture. It states that the by-law under which it was issued does not settle a special rate per annum to be levied in each year according to the statute, and so the debenture is void.

This act of 18 Victoria, which gives currency to these debentures by enabling the transfer of them by delivery or



endorsement, speaks in every section of debentures issued "*under the formalities required by law.*" I take this expression to include not only what is required by the 198th sec. of 12 Vic., ch. 81, which provides merely for sealing with the seal of the corporation, and signature by the head of it, as giving it validity, but also sec. 177 of the same act, which requires that every by-law for the creation of a debt, or negotiation of a loan shall in order to bind the municipality, settle a special rate for the payment of such debt or loan. Perhaps also, the 4th & 16th sections of the 14th & 15th Vic., ch. 109, would equally come within the term, "*formalities required by law.*" The dispensation with the plaintiff's setting forth, or proving the notices, by-laws, or other proceedings on or by virtue of which any debentures may have been issued, rather strengthens than removes my impression on this point. It will not be, I suppose, contended that the debentures can be binding on the defendants, though the by-law on which it is founded is not. The dispensation with a special rate, and which the 4th and 16th section just referred to, in respect of bonds given to Her Majesty under 14 & 15 Vic., ch. 124, leads to the same conclusion. Mr. Wilson argues that inasmuch as there is a class of debentures which may issue without a by-law imposing a special rate, and without other formalities, we must intend this is one of such debentures. It may be so, if there be nothing shewn to the contrary. The 4th plea in substance states this is a debenture issued under a by-law, which provides no special rate, as required by law, and therefore is void. The plaintiffs might, I think, have traversed either that the debenture was issued under a by-law, or that a by-law did not contain a provision imposing a special rate. The opinion of *Macaulay*, C. J., in *Mellish v. Brantford Town Council* (2 C. P. U. C. Reports), at page 48 and page 49, is in favor of the sufficiency of the plea in this respect. It is not without a good deal of difficulty I have arrived at the conclusion that the plea is not maintainable. But it seems more reasonable to hold that the defendant should have averred that this debenture was issued in pursuance of a certain by-law specifying it distinctly, and then have pointed out the defect

in the by-law relied upon as avoiding the debenture. Even then the plaintiff might reply facts which would shew the validity of the debenture. It is, however, enough for him to rest his case on what the statute declares shall be sufficient, and if the deduction of law with which the plea concludes, is not a necessary consequence from the premises to insist that the plea fails. It appears to me the plea would be true in regard to a debenture issued by the defendants under the combined effect of the 70th and 75th section of 16 Vic., ch. 182. Debentures founded under the non-resident land fund, may be issued under a by-law which would not contain any provision for a rate to provide for their extinction. And if so, the legal deduction from the facts with which the plea concludes, is ill founded. All might be true and yet the plea would shew no defence. The plaintiffs are therefore entitled to our judgment on the demurrers to both pleas.

Judgment for plaintiffs on demurrer.

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## EX PARTE ALDWELL V. THE CITY OF TORONTO.

### *Municipal Corporation—By-Law.*

Under statutes 12 Vic., ch. 81, and 16 Vic., ch. 181, a by-law imposing one uniform rate for draining into the common sewers of a city of 5s. per foot frontage, to be charged upon the proprietors of real property for each and every foot frontage of property draining into the said sewers.

*Held*, invalid, as being an arbitrary rate, not taxed in proportion to the assessed value of the property, and not maintainable under the 10 Vic., ch. 181, sec. 15.

In Hilary Term last, *Hallinan*, at the instance of J. A. Aldwell, a ratepayer, moved to quash a by-law of the City of Toronto, passed on the 1st September, 1856, intitled "An Act to alter and amend the city laws relating to common sewers," or the second, third, and fifth sections thereof, on the following grounds :

First—That by the second section of the by-law it is attempted to levy an arbitrary rate of a *certain sum* instead of levying an annual rent, or by assessment in proportion to the value of property.

Second—That the third section is uncertain, because the municipality has no power to declare any lot to front on two streets for the purpose of an arbitrary tax; and because it

is uncertain as to what is meant by the principal front of a lot.

Third—That the fifth section is illegal because of the rate, and is uncertain in not defining what property may be specially benefited by any sewers, or who should pay the tax.

The sections of the by-law necessary to refer to are as follows :

2nd—That one uniform rate for draining into the common sewers of the city, of 5s. per foot frontage, to be called the sewerage rate, shall be charged upon the *proprietors* of real property for each and every foot of frontage of property draining into the said sewers.

3rd—That all real property situated at the corner or junction of streets shall be taken to front on both streets, and the proprietor thereof shall be chargeable with the said sewerage rate on both streets except a depth of sixty-six feet on the side or flank from the principal front thereof, which is hereby declared exempt therefrom.

4th—That from and after the first day of January, 1857, it shall be lawful for the Board of Works for the time, being under the sanction, and by the order of the Common Council of the city of Toronto, to construct common sewers in such parts of the city as they may consider necessary for the health, cleanliness and convenience of the said city and the inhabitants thereof, or where two-thirds of the inhabitants of any street or lane, or any portion thereof clearly defined between cross streets, shall, by petition to the said Common Council, require the same, provided such street or lane or portion thereof be so situated as to afford a proper and sufficient outlet for such drain.

5th—That the proprietor of all real property specially benefited by the said common sewers, or situated on either side of such street or lane, shall be chargeable with and liable to the payment of the said sewer rate, and are hereby assessed at the rate of five shillings for each and every foot of frontage thereon as hereinbefore defined.

6th—That it shall be the duty of the city engineer for the time being, at such time as he may be requested so to do, to render to the clerk of the Common Council a statement

of all sewers which have been constructed during the three preceding years, shewing the names of the streets in which such sewers have been constructed, the extent and cost thereof, the names of proprietors whose property may front on such streets, and the frontage of the lot or lots owned by such proprietors, and such further information as may be required to enable the said Clerk of the Common Council to assess such proprietors in accordance with the provisions of this act.

7th—That it shall be the duty of the Clerk of the Common Council, under the direction of the standing committee on finance and assessment of the said council for the time being, to cause such sewerage rate to be inserted in the collectors' roll for the ward in which such common sewer shall be situated, and such sewerage rate shall be received, collected, and paid over by the collector of such ward at the same time and in the same way and by the same means as the general taxes of the said city are received, collected, and paid over by him.

The statutes applicable to the subject are, 12 Vic. ch. 81, sec. 31, No. 9; 12 Vic. ch. 81, sec. 81, No. 5; 12 Vic. ch. 81, sec. 107, No. 3.

12 Vic. ch. 81, sec. 31, No. 9, gives power to township municipalities to make by-laws for the erection, construction, or repair of such drains and water-courses as the interests of the inhabitants of such township shall, in the opinion of the municipality, require to be so erected, constructed or repaired, at the public expense of such township.

Sec. 81, No. 5, gives power to town councils to make by-laws for assessing the proprietors of such real property in any such town as may be immediately benefited by such improvements, for such sum or sums as may at any time be necessary to defray the expenses of making or repairing any common sewer, drain, flagging, posts or pavement in any public highway, street, square or place immediately opposite or near to such real property, and for regulating the time and manner in which such assessment shall be collected and paid.

Sec. 82, gives cities all the privileges and powers of incorporated towns.



Sec. 107—Thirdly, gives common council of city authority to make by-laws for borrowing all such sums of money as shall or may be necessary for the execution of any city work within their jurisdiction and the scope of the authority by the act conferred upon them, and

Fourthly—For raising, levying and appropriating such moneys as may be required for all or any of the purposes aforesaid by means of a rate to be assessed equally on the whole ratable property of such city according to any law which shall be in force in Upper Canada concerning rates and assessments.

16 Vic. ch. 181, sec. 15, gives to the common council of the city in addition to the powers they possessed, authority to make by-laws.

Firstly—To fix an annual rent upon the drainage of any house, cellar, yard, or land into any common sewer, and to charge the property so drained for the payment of such rent during the time it shall be so drained into such sewer.

16 Vic. ch. 182 sec. 13, provides that all taxes to be levied under that act, or the municipal corporations act, or any other acts passed or to be passed whereby any local or direct taxes shall be authorized to be levied, and where no other express provision shall be made in this respect, shall be levied equally upon the whole real and personal property of the locality to be taxed in proportion to the assessed value thereof, and not upon any one or more kinds or species of property in particular or in different proportions.

In Easter Term last *A. Wilson*, Q. C., shewed cause, and contended that these enactments must all be construed in *pari materia*, and that they clearly give power to the common council to levy the tax on the proprietor, and the amount mentioned must be taken as the sum necessary to defray the expense of making the sewer "opposite to such real property." That 16 Vic. ch. 181, sec. 15, No. 1, should be read in connexion with No. 2, which permits the whole ratable property of a particular street, square or alley to be rated to defray the expense of lighting, when petitioned for by two-thirds of the resident freeholders and householders of such street, &c.

And that 12 Vic. ch. 81, No. 5, should be read in connexion with No. 6, which makes a similar provision for a special rate to be assessed equally on the whole ratable property in a street, &c., for watering such streets, &c. That these sections thus contrasted shew that a rate may be levied for special improvement on the whole ratable property in a street. And that a rate may legally be levied for improvements on the proprietors of property which may be immediately benefited thereby.

He referred to the *Justices of Bedfordshire v. The Commissioners for the improvement of Bedford*, 7 Ex. 658; *The Governors of the Bedford General Infirmary v. The Commissioners for the improvement of the town of Bedford*, Ib. 768; *Dorling v. The Local Board of Health for the District of Epsom*, 5 E. & B. 471; *Metropolitan Board of Works v. Vauxhall Bridge Company*, 29 L. T. 211, Q. B., 12 June.

*Hallinan* contra, contended that the previous power possessed by common council to tax for sewers was virtually taken away by section 15 of 16 Vic. ch. 181, which distinctly lays down how a drainage tax is to be raised: that all assessments must be levied according to the value of certain property, not according to lineal feet. That one 25 feet on a street may be worth much more than another, and this mode of rating is contrary to the principle on which assessments are now made in Upper Canada.

DRAPER, C. J., delivered the judgment of the court.

The statute of 16 Vic. ch. 181, sec. 15, No. 1, authorises the fixing or imposition of an annual rent upon the drainage of any house, cellar, yard, or land during the time it shall be drained into any common sewer.

The effect of this enactment is to authorize the creation of a direct charge upon property, which, if not paid by the occupier may be distrained for upon, or levied and made out of the house, &c., so charged.

I understand Mr. *Wilson* to rest the validity of the second section of the by-law upon this section of the statute.

The section of the by-law is founded on the same consideration, namely, drainage into the common sewer. But

here it seems to me they diverge, for while the statute speaks of an annual rent on the drainage, the by-law imposes a rate of 5s. per foot frontage, on the proprietors of real property for every foot of frontage of property draining into the sewer.

An annual rent on the drainage of a house, and a charge upon the proprietor of the house of 5s. for every foot frontage of the land on which it stands, appear to me quite different things. The one, as a charge on the property may be levied on the occupier. The other, being a charge on the proprietor, can be enforced only against him; and that whether he is occupier or not, and if so, property elsewhere situated may be made available to satisfy it.

Then the fixing a uniform rate of five shillings without saying more, does not seem strictly to meet the words of the statute in making the rent annual. It is a rate of a specific sum, which paid once by the proprietor, the terms of the by-law are satisfied. A single payment of 5s. per foot frontage of property drained, by way of sewerage rate, and an annual charge by way of rent so long as the property is drained, are surely very different things. The 14th section of 16 Vic. ch. 182, bears on this suggestion.

Then, when the statute makes no other express provision all taxes under municipal acts are to be levied equally on the whole real and personal property of the locality to be taxed, in proportion to the assessed value thereof, and not upon any one or more kinds or species of property in particular, or in different proportions. An express provision is here made for levying a tax in the form or by the name of an annual rent, and upon specific property. The express provision goes no farther; and when the amount of such rent is to be determined, I think it more reasonable to hold that it must be based upon the assessed value of the property than upon the discretion or arbitrary determination of the municipality.

For these reasons I am of opinion the second section of this by-law is bad, treating it as intended to provide for payment for using the common sewers.

The fifth section seems framed for the purpose of defraying the expense of the construction of common sewers, read

in connexion with the 4th section. This is its obvious import, and the charge imposed has no reference to the use of the sewer, and is moreover not a general rate, but a tax on the proprietors of certain real property.

In this respect it is endeavoured to be upheld under 12 Vic. ch. 81, sec. 81, No. 5. It may be open to question whether the term "proprietors of real property immediately benefited" used in the statute, "and proprietors of real property specially benefited" are synonymous. It might not be difficult to shew a substantial distinction between them. But there are other objections to this section which I apprehend are fatal.

The statute, as I read it, contemplates the raising some fixed sum which has been estimated to be necessary for defraying the expense of making or repairing any common sewer. Then it departs from the general principle of imposing rates by authorising such sum to be raised by assessment on the proprietors of the property immediately benefited. But for this special provision the sum required must have been raised by an assessment on all the proprietors, or more strictly speaking, on all the property in the city. When the proprietors of property immediately benefited are ascertained, they form a class who may be assessed for the sum to be raised. But in this instance also, I do not suppose the legislature intended to sanction any further departure from the system of imposing municipal taxes than is expressed. And I find no expression which, in my judgment, authorises the common council to fix the amount to be paid by such proprietor otherwise than by reference to the assessed value of his property. But this section nor the preceding one, which may be read with it to make its meaning clear, determines no sum to be raised, but it imposes a tax of 5s. per foot frontage of the property benefited, upon the particular class, without any reference to the cost of the improvement, or to the assessed value of the property belonging to such proprietor.

I have not overlooked the words in the latter part of the section giving authority to make by-laws "for regulating the time and manner in which the assessment charged on the particular proprietors shall be paid." I do not think



these words affect the manner in which the amount of liability is to be ascertained, or deprive the class of proprietors taxed of the power of ascertaining what aggregate sum is charged upon them as the expense of constructing or repairing the particular improvement.

For these reasons, I think the fifth section also bad.

As to the third section, it is merely ancillary to the second and fifth. Without them it has nothing to act upon.

Rule absolute.

### SHIELDS V. THE GRAND TRUNK RAILWAY COMPANY.

#### *Railway crossing—Negligence.*

Under the 14th & 15th Vic., ch. 51 sec. 21, the omission to ring the bell and sound the whistle of a locomotive engine on approaching a highway crossing by the railway, was held evidence of breach of duty and negligence on the part of the company sufficient to support a verdict of damages for the value of cows killed by the engine at such crossing. (See 20 Vic. ch. 12, sec. 16, since passed.)

The first count in the declaration was framed with a view to the statute 14th & 15th Vic. ch. 51, sec. 21; fifthly, and charges that it became the duty of the defendants, while using the locomotive engine in passing along their railway, to furnish each engine with a bell at least thirty pounds weight, or a steam-whistle, and to cause the bell to be rung or the whistlesounded while any of the engines were approaching a place where the railway crosses a highway at the distance of at least eighty rods from such place, and to cause such bell to be kept ringing or whistle sounded at short intervals until the engine should have crossed the highway: that defendants not regarding, &c., whilst using their engine, in passing the railway at a rapid rate, approached and crossed the highway (described before), with the engine on the railway at the place where the same crossed the highway, without ringing the bell or sounding the whistle at the distance of eighty rods, &c., and without keeping the bell ringing or whistle sounded at short intervals, &c., but omitted and neglected so to do contrary to the statute, whereby and by reason of such omission and neglect, two cows of plaintiff then lawfully on the highway at the said place, were (without any fault or negligence on the part of plaintiff)

killed. The second count, after the usual inducements of defendant's ownership of the railway and engine, carriages, &c., and that the railway crossed a highway, and that the plaintiff owned two cows which were lawfully on the highway, states that the defendants so carelessly, unskilfully and improperly drove, &c., their engines and carriages along the railway across the highway, that through the carelessness, negligence and improper conduct of defendants, by their servants, the engines, &c., struck plaintiff's cows, then being lawfully on the highway, and killed them.

To these counts the defendants have pleaded—1st. Not guilty: and 2nd. That plaintiff's cows were wrongfully on the highway after nine o'clock p. m., contrary to the township by-laws, and that defendants were lawfully passing along their railway with their engine, and that in consequence of the cows being on the railway and highway the defendants unavoidably, and without negligence, and by unavoidable accident, ran against and killed plaintiff's cows.

At the trial at Brockville, in April last, before *McLean, J.*, the plaintiff proved that two of his cows were killed on the night of the 4th of July, 1856, at a place where the railway crossed the highway; the plaintiff lived on lot No. 24, 1st concession of Augusta, adjoining this highway, and the cows, after being milked that evening, were turned out into an unenclosed piece of ground adjoining the highway, but some considerable distance from the place where the railway crosses it. Several witnesses called for the plaintiff swore, that though they were close by, near enough to hear one of the cows bellowing after it had been struck by the engine, they neither heard the bell ring nor the whistle sound, though they swore they could have heard either or both if rung or sounded. The plaintiff also proved the township by-law, from which it appeared that in suffering his cattle to be at large on the highway, the plaintiff was guilty of no contravention thereof. The night was still and rather dark as they stated; there was no other proof of negligence than the omission to ring the bell and sound the whistle. The witnesses for the defence said the night was very dark, so that they could not see cows lying on the track in front of

the engine: that the train was going about eighteen miles an hour, on a down grade, and that the steam was shut off before coming to the crossing. The engineer in charge swore that he rang the bell eighty or ninety rods before coming to the crossing, and a fireman who was with him swore that he recollected the bell being rung before they approached the crossing. It was stated that the whistle frightened cattle so as to do mischief, that they sometimes ran in the way instead of out of it. The fireman said that he had observed the noise of the wheels would nearly drown the sound of the bell; that he never saw cattle pay much attention to the bell.

At the close of the plaintiff's case, the defendant's counsel objected: that no negligence was shewn which could have caused the death of the plaintiff's cows; that the injury was not shewn to have arisen from any omission to ring the bell or blow the whistle; and therefore neither of these counts were supported: that it was an act of negligence on the plaintiff's part to suffer the cows to be on the road at night, and that this negligence contributed to the injury of which he complains, and deprives him therefore of recourse against the defendants. Leave was reserved to move for a nonsuit. No question was raised upon defendant's duty to fence.

The case was left to the jury with a direction against which the defendant's counsel offers no objection, and they found for plaintiff, with £21 4s. damages.

In Easter Term, *Bell* (of Belleville) obtained a rule *nisi* for entering a nonsuit pursuant to the leave reserved, or for a new trial, the verdict being against law and evidence, and against the judge's charge. The points relied on were, that admitting the duty charged in the first count, it had no relation to the present action, for the ringing the bell and sounding the whistle were like the putting up the notice boards at railway crossings, intended as notices to mankind, but not as alarms to frighten animals off the track of the railway; and that there was no negligence shewn under the second count.

*A. Richards*, shewed cause.

DRAPER, C. J., delivered the judgment of the court.

It appears to me that the gist of the second plea is that the cattle were at large contrary to the township by-laws, and so wrongfully. The by-law which was in evidence does not maintain the assertion in the plea, and so far, I think the defence fails.

Then the case turns upon the question whether, under the first count a breach of duty, or under the second a negligence on the part of the defendants which has caused the injury complained of, was proved; whether there was evidence to be left to the jury to determine these questions in plaintiff's favour. To decide this, it is necessary to consider, whether the duty imposed by the part of the 21st section of the statutes is of such a character, that the omission of it would be evidence of negligence, and if so, whether the damage resulted therefrom; the latter being a question for the jury, the former also involving a question of law. I think we are warranted in assuming that the jury have found as a fact, that the omission to ring the bell or blow the whistle caused the death of the cows; for without this finding the verdict would probably have been for the defendants. It could not have been left merely to find whether the cows were killed by the engine; the additional enquiry whether the defendants were guilty of negligence must also have engaged their attention, and on the trial it does not appear that any other negligence was suggested or complained of. Was there then evidence to go to them on this latter point?

I am not able to bring myself to the conclusion that the ringing of the bell or sounding the whistle was intended only as a warning to human beings of the approach of the train and the necessity of getting out of the way. The sound of the wheels as they run is audible at a very considerable distance, and to all beings possessed of reasoning faculties plainly indicates the approach of the train. But here, cause and effect speak only to reasoning beings, the distant roll conveys to irrational animals no sense of approaching danger. But the bell, and more especially the whistle, have a different effect in creating alarm and inducing animals to



flee from the approaching sound, and I see nothing in the language of the act which necessarily confines its application in the manner suggested by the defendant's counsel. The language requiring the use of the bell or whistle is general, not merely directory, but as I understand it mandatory, and if the command be not obeyed, there is a breach of duty, or a negligence shewn, and if damage to any individual either in person or property be the result, I apprehend the company are liable to make it good. As I understand the finding, the jury have determined the damages to have resulted from this neglect and omission, and I think, therefore, this rule should be discharged.

The statute of last session, ch. 12, sec. 16, has made a general provision restricting the owners within a limited distance of such railway crossings from allowing their cattle to run at large. This restriction will no doubt diminish the number of such accidents, while it materially alters the position of such owners in relation to their cattle being lawfully on the highway.

*Per Cur.*—Rule discharged.

N. B.—The Chief Justice referred to the following cases : Sharrod v. London and North Western Railway Company (8 Ry. cases, 239), Fawcett v. York and North Midland Railway Company (16 Q. B. 610), Renaud v. Great Western Railway Company (12 U. C. Q. B. 408), Davies v. Mann (10 M. & W. 546), Clayards v. Detrick (12 Q. B. 439) Greenland v. Chaplin (5 Exch. 243), Aldridge v. Great Western Railway Company (3 M. & G. 515), Rigby v. Hewitt (5 Exch. 240), Lygo v. Newbold (9 Exch. 302), Thorogood v. Bryan (8 C. B. 115), Hatfield v. Roper, (21 Wendell 615), Spencer v. The Utica and Schenectady R. R. (5 Barbour 337), Smith v. Dobson (3 M. & G. 59).

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## GAGE V. BATES.

*Trespass—Right under grant from the crown—Navigable stream—Easement.*

This action was brought to try the right to an inlet on Burlington Bay. The plaintiff claimed title by patent dated 19th March, 1798, and contended that it conveyed the inlet; and that the "bank" referred to in the patent was part of the bay, and not part of the inlet, and that consequently the public had no right thereon. Defendant contended that the inlet was part of the bay, and that the patent did not cover, but excluded the inlet; and further, that the *locus in quo* being navigable waters, if the crown could grant at all, the public have the right to use and fish in it.

*Held*, that the *locus in quo* is a navigable river, and therefore the public have a right to the free use thereof as such.

TRESPASS *qua. clau. fregit* to lot No. 4 in the broken front, and lot No. 4, in the first concession of the township of Barton.

*Plea*—not guilty.

The case was taken down to trial at the last spring assises, held in the City of Hamilton, the *locus in quo* was an inlet from Burlington Bay, which extends through the broken front into the first concession. The trespass complained of is in going in a skiff on the waters of the inlet and fishing there, and also in placing nets in the waters of the inlet. These acts were done after the plaintiff had forbidden him: the defendant asserting he had a right to do the acts complained of. The action is really brought to try the right whether, in the first place, the land covered with water belongs to plaintiff and was granted by the government patent. Secondly, if so, whether there is, nevertheless, the right or easement in the public to pass over the same in boats for all awful purposes, and to fish and shoot thereon.

The lot was patented on the 19th of March, 1798, to John Dupuis, junior; it is granted as two hundred acres, being composed of lot No. 4, in the 1st concession with the broken front in the township of Barton, butted and bounded as follows: beginning at a post in front of the first concession marked three-fourth, on the bank of Burlington Bay; then north 72°, west 20 chains, more or less, along the bank to within one chain of lot No. 5; then south 18°, west 101 chains more or less to the second concession; then south 72°, east 20 chains; then north 18°, east to the place

of beginning, together with all the woods and waters thereon lying and being.

The plaintiff, to prove his title, contented himself with putting in the government patent to Dupuis, and proving that he had been in possession of the lot for about twenty-five years. From the evidence given on both sides it appeared that the water in this inlet was deep enough to admit boats of considerable size. One witness stated he had built a boat of 15 tons burthen up the fork of the inlet, in which he passed up and down it with loads; a vessel of 150 tons burthen had loaded wheat within the inlet, and rafts had been driven in there from Burlington Bay, and lumber had been floated down. It also appeared from a verified plan put in by defendant that the water at the mouth of the inlet varied from five to thirteen feet in depth, on a line drawn from the high banks on either side the deepest point being 13 feet, it was deeper within. Some of the witnesses for defendant stated they had always been in the habit of fishing and shooting there. On the other hand plaintiff's witnesses stated that parties who owned similar land considered they were entitled to the inlets, they had put them on the assessment rolls and paid taxes therefor; and two surveyors stated they would run the line from the post along the bank to within a chain of No. 5 across the inlet, although there is no discoverable bank there, yet it is on a line with the high bank on either side of the inlet. That this would make the description in the other part harmonise, for if the bank of the inlet were followed until within a chain of No. 5, then the next distance would not agree, for instead of being 101 chains to the second concession, it would only be a very short distance; that unless this view was adopted there would be on the north-west side of the inlet four or five acres of lot No. 4, which would not be included in the patent.

The defendant finally urged that by the description in the patent the inlet was excluded, and if it was not, it was a navigable water which the crown could not grant, and that the plaintiff fails to shew that he was in actual possession of the water, and that therefore trespass would not lie.

The learned judge held that if the *locus in quo* was part

of the lot granted to Dupuis, shewing his occupation of that lot for twenty-five years was a sufficient possession to maintain trespass against defendant, who must be considered a mere wrongdoer, unless the public have a right to use the water to fish, &c. He was of opinion that the patent covered the inlet, and that there was no sufficient right shewn in the public to use it. He directed a verdict for plaintiff, with leave to defendant to move to enter a verdict for him if the court should be of opinion that plaintiff, under the evidence, ought not to recover.

In Easter Term, *Freeman*, Q.C., moved to enter a verdict for defendant pursuant to leave reserved on the ground that plaintiff did not prove title to the *locus in quo*, or for a new trial, on the ground of misdirection as to the possession of the property by plaintiff, and that the verdict is contrary to law and evidence.

During the term *O'Reilly*, Q. C., shewed cause, and contended the verdict was right, that the government patent conveyed the inlet, and that that was part of the lot, and possession of part was possession of the whole against a mere wrongdoer: that the bank referred to in the government patent was the bank of the bay and not of the inlet, and that the description accorded with his views in other respects.

*Freeman*, Q. C., contra, contended that the inlet was part of the bay, and that where plaintiff contended there was a bank there was literally from six to ten, and in some places thirteen feet of water, and that the patent did not cover the inlet, but excluded it. But if it was included in the patent it was not in plaintiff's actual possession, and although it might be drawn to the possession of the real owner of the lot, yet as plaintiff shewed no title to the lot, he was only to be considered entitled to that part of it which was in his *actual* possession. Furthermore, being navigable waters, if the crown could grant at all, the public had a right to use it and fish in it. He referred to *McNeil v. Train*, 5 U. C. 91.

RICHARDS, J.—How far the evidence tendered might shew the *locus in quo* to be within the area of the lot in possession of



plaintiff as it was granted, we do not now decide. If plaintiff thinks it would be of importance to him to be able to present these facts to the consideration of a jury, we will order a nonsuit to be entered. In the meantime I can only say the matter is fairly open to discussion on the facts shewn, whether the description covers the water within the inlet. It may be urged, that by the description the disputed course north 72° west along the bank of Burlington Bay, is to follow the general outline of the shore and not to dip into the inlets which may be on the lot. On the other hand, where by following the bank as a natural visible object, you may yet reach the line of the adjacent lot mentioned, and intended by the description, it affords evidence that such was intended by the description, but we have not arrived at any conclusion on this point, as in the view we take of the case it is not necessary to decide it.

The question for us to consider is if the *locus in quo* be a navigable river, or an arm of the lake or bay to which the same public rights attach as to a navigable river, and if so, does the grant of it by the crown, if it has been granted, deprive the public of the right of passing and fishing over it.

The rule of the common law in England seems to be, that "a river is considered navigable so high as the tide flows, although it be not *altum mare*, that is where the place is covered with salt water," (Schultes, 130); the rule of the civil law is different, it is stated in Angell on Watercourses, at section 550, as follows: "By the civil law all rivers in which the flow of water is perennial, belong wholly to the public, and the public right extends to the use of the banks as well as to fishing. *Navigable* rivers, in the language of the civil law, are not merely rivers in which the tide flows and reflows, but rivers capable of being navigated; this is, navigable in the *common sense* of the term. In the words of the digest a navigable river is '*statio iturve navigio*.' In the code Napoleon navigable rivers are spoken of as floatables, that is rivers admitting floats."

If we hold that the rule of the common law as to the flux and reflux of the tide being necessary to constitute a body of water a navigable stream or river in this country, then our

great lakes and rivers flowing for hundreds of miles, which in many places along their course are the boundary and common highway between this province and a foreign country, must be considered as subject to the incidents of small inland streams, flowing for comparatively a short distance, in a country like England, and subject to exclusive rights of fishing, &c., which may be granted by the crown to the proprietors of adjacent land, or other rights which there vest in the owners of the soil adjacent to the shores of these streams. The opinion expressed by the learned judges of the Common Pleas, in *Parker et ux. v. Elliott* (1 U. C. C. P. 470), although not expressly deciding this point, seem to me to lead to the conclusion at which we have arrived; that the rule of the common law, as to the flux and reflux of the tide being necessary to constitute a body of water a navigable river, does not apply to a case like the present. Then suppose there was a flow of the tide in the *locus in quo*, do the facts in evidence satisfy us that it was a navigable stream. In *Miles v. Rose et al.* (5 Taunton, 705), defendant obstructed plaintiff's barges in a certain navigable river called Rainham Creek. It appeared the place was a creek, running from Rainham Bridge to the Thames, in which the tide flowed to the bridge: that boats and vessels came up the creek, nearly all of which came to load at defendant's wharf, a few boats had landed their cargoes, not at defendant's wharf, boats with parties of pleasure had been known to sail up the creek, and boats came with persons who cut reeds along its banks. The defendants, who claimed the soil of the creek, proved they purchased the premises for a large price, which were conveyed to them by the description of Rainham wharf and creek; that the creek was not navigable until their predecessor had made it so at considerable expense, and erected a wharf; that they had for many years received from the owners of vessels frequenting their wharf, and from plaintiff himself, not only wharfage but also tolls for navigating the creek. On motion for new trial, Sir *Vicary Gibbs*, C. J., said, "The flowing of the tide was strong *prima facie* evidence of its being a public navigable river, and the cutting of reeds

was a very strong act indeed, and even as to the pleasure boats, if a person wishes to protect his exclusive possession he must keep up the evidence of his right by guarding it against intruders."

We are of opinion that the evidence of the depth of the water within and in the entrance to the inlet, and the use of it by boats of considerable size, and the loading of a vessel therein of the burden of 150 tons, together with the floating of timber down it, and the further use by boats to fish and shoot therein, affords much more satisfactory evidence of its being a navigable stream than the case referred to in Taunton, when the court refused to disturb the verdict.

If the *locus in quo* is a public navigable river, then it is a public highway, and all her Majesty's subjects of common right may pass over it in boats and fish therein, notwithstanding the grant of the soil by the Crown, for such grant must be taken subject to the public right.

In *Warren v. Matthews*, 6 Mod. 73, it was held, "Every subject of common right may fish with lawful nets, &c., in a navigable river, as well as in the sea, and the king's grant cannot bar them thereof." S. C., 1 Salk. 357.

The case of *Carter et al. v. Murcot*, 4 Burr. 2163, may be referred to as an authority in favour of the grant of exclusive right of fishing in a navigable river; the note, however, to the case itself, seems to question its authority, and Schultes, at page 100, says, "Whatever opinion may be formed, or whatever arguments may be advanced in regard to a fishery in public streams being a royal franchise, derivable from the Crown, and claimable exclusively by grant, charter, or prescription, they must, we conceive, yield to the plain and uncontrovertable fact adverted to by our earliest as well as our modern writers, that every subject of common right may fish in the sea and in navigable rivers, unless restrained or prohibited by the local usage of any particular place. Upon a calm and deliberate investigation of the early principles of our system of jurisprudence, this observation will naturally result from it, that the king cannot by any grant or charter, including the soil or fishery, convey a several right to any individual to preclude another from the

exercise of his general right of fishing, and though some decisions may justify a contrary opinion, yet, to a free and dispassionate mind, they must appear to be established upon an objectionable basis, and operating to abridge a liberty which is contemporary with our earliest legal institutions. And that such a private appropriation of a fishery authorised by a grant, in a navigable river, being incompatible with the public right, cannot exist in law." It is added, however, that custom may, in some particulars, vary the law in this respect.

In a case referred to in a note to *Harmond v. Pearson*, 1 Campbell 515, Wood, B., states, "A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please." In a note to another case in the same volume of Campbell's reports, it is stated at page 312, that a several fishery in an arm of the sea cannot be expressly claimed under an existing grant from the Crown, as a grant to support it must be as old as the reign of Henry II.; and therefore beyond time of legal memory. In *Mayor of Colchester v. Brooke*, 7 Q. B. 339, at page 374, Lord *Denman* observes, "The right of the soil in arms of the sea and public navigable rivers, which the Crown *prima facie* has independently of any ownership in the adjoining lands, must, in all cases, be considered as subject to the public right of passage, however acquired. and any grantee of the Crown must of course take subject to such a right," and in that case the reporter puts a query, whether, after *Magna Charta*, the Crown can grant by charter a fishery in a navigable river.

There are several cases decided in our own courts, which, if we may judge by the digest of them, such as *Moffatt v. Roddy*, Michaelmas Term, 2 Vic., seem to confirm the doctrine that our large lakes, and navigable rivers, and inland waters are to be viewed as navigable rivers at the common law. I have not been able to see these cases, as they are not reported, but I understand their effect to be as I have stated. The American cases on the subject vary in different States, and afford no certain rule. The best opinion I can form on the subject, after giving it attentive consideration, is,



that the *locus in quo* must be viewed as a navigable river, and that, consequently, the right of defendant and the rest of the public to pass over it for the purpose of fishing, &c., is thereby established, so that this action cannot be maintained.

Mayor of Colchester v. Brooke (7 Q. B. 339), Moffatt v. Roddy (U. C. Michaelmas Term, 2 Vic.), Parker et ux. v. Elliott (1 U. C. C. P. 471; Angell P. 561, sections 546, 548, 550), Ball v. Herbert (3 T. R. 253; 1 Campbell 517, 312; Comyn's Digest, Navigation A, Piscary A; Hale de Jure Maris 17; Schultes on Aquatic rights 15, 100; Miles v. Rose, 4 Taunt. 706.

HAGARTY, J.—I agree in the conclusions arrived at by my brother Richards, but I desire to add that I am inclined to the opinion on the evidence before us, that if the facts shew the existence of a visible, defined “bank,” in Burlington Bay, turning inland along the windings of the inlet in question, and no bar existing across the inlet, we should construe the patent as excluding instead of including the waters on which the defendant is alleged to have trespassed. I am aware that such a construction does not harmonise with the distances given in the patent, and creates considerable difficulty, but I rather lean to the belief that, taking the words used in the sense most favourable to the crown, as grantor, we should, if possible, give it such a construction as would not preclude the idea that the king designed to make any grant at variance with the public right over deep navigable water.

In Parker v. Elliott, *Macaulay*, C. J., in his very learned judgment, in construing a patent worded somewhat similarly, says: “I think clearly, that to the lake or to the bank of the lake, means to high water mark.” And again, “I consider that by ‘the bank,’ as used in this description, must be taken to have been intended the “*ripa*,” or land above the high-water line.”

When I find the crown giving as a boundary a line “beginning at a post, &c., at the bank of Burlington Bay, then north 72°, west 20 chains, more or less, along the bank to within one chain of lot No. 5,” I prefer following

the clearly defined "bank" in all its windings, to crossing over an inlet some hundreds of feet wide, which, according to the best opinion I can form on the evidence, is as much a part of Burlington Bay as any other portion of the land covered by its navigable waters.

By making the words "along the bank" in this patent govern, instead of a distance "more or less," we can arrive at a point "within one chain of lot No. 5," although not the point to which a rigid adherence to the number of chains and links actually expressed would lead us. This construction would also exclude the small pieces of land claimed by plaintiff on the No. 5 side of this inlet. I prefer, on the whole, to consider that the crown did not designedly vest in plaintiff what I cannot help regarding as clearly a portion of the navigable waters of Burlington Bay. In either view, however, the plaintiff must fail. I think that a nonsuit should be entered.

Rule to enter nonsuit absolute.

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#### PARKER v. MCCREA.

*Promissory notes—Extinguishment of right to sue thereon by taking chattel mortgage.*

The plaintiff holding defendant's note for £85 2s. 4d., with interest, takes a chattel mortgage, intending it as a collateral security.

*Held*, that the right to sue on the promissory note was extinguished by taking the mortgage.

*Read*, D. B., shewed cause during this term against a rule *nisi* for entering a nonsuit on leave reserved by the judge of the county court of the county of Wentworth, to whom the writ of trial had been directed, citing *Price v. Moulton*, 10 Com. B., 561; *Holmes v. Bell*, 3 M. G. 213.

The action was against defendant as maker of a promissory note, dated the 15th March, 1855, payable to Kennedy Parker & Co., of which firm plaintiff was surviving partner, at twelve months' date, for £85 2s. 4d. The defendant had pleaded *non fecit*, and 2nd. That by an indenture dated the 9th of March, 1857, and before the accruing of the causes of action in the declaration made between plaintiff and defendant, defendant

covenanted to pay to plaintiff the sum of £90 and legal interest from the day last mentioned, and delivered the indenture to plaintiff, and plaintiff accepted it in full satisfaction of the causes of action in the declaration. 3rd. Payment—on which pleas issues were joined—all the issues were found for plaintiff.

The evidence was, that the promissory note, and the debt mentioned in the indenture of the 9th March, 1857, were one and the same debt: that the plaintiff had only one claim against the defendant; but that this indenture, which was a mortgage of chattels, was taken as a collateral security, not as a satisfaction for the debt, by verbal agreement between the parties.

The learned judge ruled that the evidence was sufficient to go to the jury to establish the second plea, reserving leave to defendant to move to enter a nonsuit, if the effect of giving and taking this mortgage for the same debt was to extinguish the debt or remedy on the promissory note.

*Connor*, Q. C., and *Eccles*, Q. C., supported the rule, referring to *Yates v. Ashton*, 4 Q. B. 182; *Loomis v. Ballard*, 7 U. C. 366.

DRAPER, C. J., delivered the judgment of the court.

The execution of the indenture stated in the plea was admitted by the replication; the subscribing witness was not called, and I presume it was agreed by both parties that the chattel mortgage produced was the indenture referred to in the plea. It is a conveyance of certain chattels of the defendants to the plaintiff in consideration of £90 well and truly paid by plaintiff to defendant, at or before the sealing, &c., and is subject to a proviso that it shall become void on payment of £90 with legal interest from 9th March, 1857, with a covenant that defendant will pay plaintiff the said sum of £90 with interest, on the day and time, and in the manner above limited. And if default be made in payment, then that plaintiff may sell the goods. No time is fixed in the mortgage for payment by defendant. The debt was immediately due therefore, or at the utmost, it was due upon demand. Time, therefore, was not given, if that would have made any difference.

As a matter of fact, the jury must be taken to have adopted the representation of the only witness called at the trial, and to have found that it was not intended by the plaintiff when he took this mortgage to do more than obtain a collateral security for the payment of the note, which was then nearly a year overdue. He certainly did not, by the terms of the mortgage, preclude himself from suing for his debt immediately.

But exclude the parol evidence for a moment, and then how does the case stand. The defendant owes the plaintiff £85 2s. 4d. on a promissory note, with interest, and to secure this debt he gives plaintiff a mortgage under seal, of his chattels, with a covenant to pay the sum stated in such mortgage. Neither party deny the identity of the debt secured by the mortgage with that due on the promissory note. The defendant asserts it by his plea, and the plaintiff confesses it; replying that it was not taken in satisfaction and discharge. On this statement, it would be merely a question of construction and legal effect of the deed, and there can be no doubt that it would be treated as an extinguishment of the right to sue upon the promissory note.

Then was parol evidence admissible to vary the effect of the deed—Mr. *Read* did not argue that it was admissible—but said it was received without objection, and therefore should have its effect; but it appears the defendant's counsel moved for a nonsuit, on the very ground that the deed put an end to the plaintiff's right to recover in this action, and so the objection was raised.

I am of opinion that the rule should be made absolute.

*Per Cur.*—Rule absolute.

N. B.—The learned Chief Justice referred to *Price v. Moulton*, 10 C. B. 561; *Ford v. Beech*, 11 Q. B., 852; *Loomis v. Ballard*, 7 U. C. Q. B., 366; *Twopenney v. Young*, 3 B. & C, 208; *Matthewson v. Brouse*, 1 U. C. Q. B., 272.

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## STOCK V. WARD ET AL.

*Crown survey—Allowance for roads—Professional evidence.*

An original government survey of part of a township, made no mention of roads, and it was apparently the surveyor's intention the roads should be taken out of the then (wild land) adjacent. The surveyor who afterwards surveyed the adjoining lands, treated the road allowance as included within the lines of the original survey, whereby the plaintiff's lot would be diminished one chain in breadth. The jury having found for the defendants, the court ordered a new trial, considering such verdict against the weight of evidence.

The weight attached by the court to the evidence given by professional witnesses is diminished by efforts to sustain the views of the party who may call them—it should be given free from bias.

TRESPASS (declaration filed 17th of April, 1856) to lots No. 8, 9, and 10, first concession Etobicoke, cutting trees, &c.

*Pleas by Greer*—1. Not guilty. 2. Close not plaintiff's.

*Pleas by Ward*—1. Not guilty. 2. Close not plaintiff's. 3. That there was a public highway and allowance for road over the said close, and that he entered for the purpose of using it. 4. That there was a public highway called the 1st meridional concession line, or the concession line between concession A. & B. and between the first or western, and second or eastern meridional concessions, and that he entered for the purpose of using it. 5. Pleading the existence of a road as in the last plea, states that the municipality of the township of Etobicoke before the said times when, &c., had by an order directed the same to be opened, and had authorised defendant as their agent to execute the order, wherefore he, &c, justifying the trespass.

The plaintiff took issue on all the pleas.

The case was tried at Toronto, in April last, before the Chief Justice of Upper Canada. The plaintiff's title to lots 8, 9, and 10, first meridional concession of Etobicoke, was admitted, and that Iredell's survey was made 7th of August, 1795, under instructions not produced. His field notes were put in and read. They make no mention of any roads, either on the east or west side of the block which he surveyed. In 1811, Samuel S. Wilmot, a deputy provincial surveyor, was instructed to continue the survey *west* of the block surveyed by Iredell. There seems to have been no difficulty in tracing the west line run by Iredell then, as at the trial, witnesses spoke very positively about it. Mr.

Wilmot assumed that the allowance for road of one chain wide, which it was agreed on all hands the government intended should be left between the two surveys, was to the east of Iredell's line, and he made his survey on that assumption. When Iredell surveyed (in 1795), the land east and west of the block laid out by him was all wild. The road on the east side of his survey has been taken to the east of his line; and the plaintiff contended that it should in like manner be taken from what was unsurveyed wild land, to the west of his line, as otherwise the west lot would be deficient in its estimated frontage of twenty chains, which the other lots in Iredell's block were not. The trespass was clearly proved, if the road should be according to what the plaintiff contended, and the value of the timber cut and carried away was considerable, so that if entitled to recover the plaintiff should have had substantial damages.

On the defence it was proved that generally throughout the township of Etobicoke the roads were laid out east of the north and south lines, and south of the east and west lines, and their surveyors were called who gave their opinion in favour of that course being pursued upon such instructions and field notes as were before them at the trial. At the same time they admitted that the language used in Iredell's field notes warranted the conclusion that he intended the road to be one chain west of his west line, for he could not otherwise have planted and designated the north-west angle of lot No. 5, on the west line surveyed by him, that angle would, on the contrary, have been a chain to the east of his west line, and the point he designated would have been the opposite angle of lot No. 6, a lot not included in his survey, and not in fact surveyed until long afterwards, and the distance for lots in his block would be 99 chains instead of 100, depriving the west lot of one chain of its intended frontage. It was also urged that in 1811 the government had granted no lots except lot No. 5 in the broken front and first concession, that were included in Iredell's survey: that admitting Iredell's survey was such that it must receive the construction put on it by the plaintiff, it was competent for the government to vary that plan, and to alter it, and that Wilmot's survey

shewed they had done so, and had removed the intended allowance for road east of Iredell's west line. To this it was answered, that the instructions to Wilmot shewed no intention to vary or alter Iredell's work on the ground; but on the contrary, plainly directed his (Wilmot's) work to be supplementary to, and in accordance with, what had been already done; and that in placing the allowance for road east, instead of leaving a space for it west of Iredell's line, he was either acting on a mistake as to what Iredell had done, or going contrary to the instructions which he had received.

The learned Chief Justice left it to the jury to determine whether Iredell laid out or reported any road, and if so, where was it? If he did not, then did the government lay out a road opposite plaintiff's land, and before they had granted away that land, and east of Iredell's line. According to their determination of these questions they would find for plaintiff or defendants.

They gave a verdict for defendants.

In Easter Term *Galt* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to the law and evidence, the weight of evidence, and the judge's charge. He supported his rule in the following term. No cause was shewn in fact, the defendant's counsel being prevented from attending, but it was stated by *Galt* that he did not desire to ask for his rule as by default of the opposite party, or to treat the defendants as abandoning their verdict.

DRAPER, C. J., delivered the judgment of the court.

I think there should be a new trial with costs to abide the event. Another jury may possibly arrive at the same conclusion, and if so, the defendants will recover the costs of both trials.

In the mean the evidence appears to me to preponderate in favour of the plaintiff. From the report of the learned Chief Justice, it appears to me there really was no room for doubt but that Iredell's block as he laid it out included no roads, but he surveyed the lots only, leaving the government to make the appropriation for roads out of the unsurveyed and unoccupied lands which were outside his lines. Every

part of his plan and report, and also of his work on the ground, appears to me consistent with the idea that he laid out no roads at all, and there is no evidence that he was instructed to lay out any, or if so, where? It seems to me that in the absence of all proof we should rather presume that his work as done was in accordance with his instructions, and therefore that they related only to the survey and laying out of lots.

Then, while fully agreeing with the learned Chief Justice as to the power of the government in 1811 to depart from the original plan of survey, provided such departure interfered with no rights which had been granted in accordance therewith, I think the evidence insufficient to warrant the conclusion that they did make any such alteration. The principal, I think I might almost say, the only facts before us are, that Wilmot's survey is inconsistent with Iredell's, and if not warranted by instructions was made in error: that it is in accordance with what has been subsequently done to lay out the road east of the line surveyed, were only a single line is run, and the opinions of the surveyors. The first of these amounts to nothing, unless the instructions directed the change, or unless the government subsequently, and before the statute of 1819, ratified and adopted it. Of this some evidence may possibly be found in the language of subsequent grants, or other official proceedings, and this appears to me the principal subject of enquiry for the system adopted in subsequent surveys cannot determine the question; and the opinions of surveyors cannot prevail against matters of fact. Indeed the weight which I should desire to attach to the opinions of practised and skilful surveyors is sometimes diminished by observing that they seem to consider themselves bound as it were to sustain the views and interests of the party who may have employed them; whereas the better course would be to give both the court and a jury the benefit to their evidence in a form more free from bias on either side. I make this observation with no particular application to the present case) but the rather that the evidence given by the surveyors is less open to it than I have frequently seen, and the opportunity is



favourable to point out a mistake which on other occasions I have noticed surveyors falling into. But whatever weight their opinions may be entitled to on professional questions, the facts in the present case what must be looked to for its proper determination, and it is on the best consideration which I have been able to give those facts that I think there ought to be a new trial.

Rule absolute for a new trial.

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MORSE V. CHISHOLM ET AL.

*Contract—Breach of—Damages—Statute of Frauds.*

On an action for breach of contract and £50 damages, the court granted a new trial on payment of costs, one of the defendants having expressly denied the contract by affidavit. *Held*, that the acceptance of part of the goods sold and actual receipt thereof need not be simultaneous to support an action upon a verbal contract.

The declaration (16th March, 1857) stated that on 1st of January, 1856, defendants agreed to manufacture for and sell to plaintiff one boiler for steam engine, the plates and columns and fire brick for the cupola required for said engine for plaintiff's foundry then in course of erection, with the requisite castings, &c., and other articles and machinery then specified necessary for the completion of plaintiff's steam engine, except the engine itself, to be made in manner set forth, and delivered by 1st October, 1856; and plaintiff confiding in defendant's agreement proceeded with the erection of the foundry, and engaged workmen to place the engine, &c., therein, and to work it, and to proceed with the business of the foundry. Yet defendants did not deliver a large portion until a considerable time after the time agreed on, and refused to deliver the residue, without which all that had been delivered was useless, whereby plaintiff was obliged to procure the same to be manufactured at great additional expense, and was prevented from using his foundry for a long time, and from manufacturing large quantities of castings, &c., which had been ordered; and so plaintiff lost the gains he would have obtained from working the foundry from the time when the agreement should have been fulfilled.

*Pleas*—1. Defendants did not agree with the plaintiff, as alleged.

2. Defendants did not make and deliver the said boiler with the requisite castings.

The case was tried at Milton, in April last, before *Burns, J.* The plaintiff gave evidence of a parol contract to deliver the boiler and castings, and that some of the things had been delivered and accepted by him after this contract made; but that defendants subsequent to the 1st October, 1856, refused to deliver more, there being some dispute about plaintiff's making payments. Plaintiff offered evidence of damages arising from loss of time, and expenses attending the procuring the articles elsewhere, greater expenses in putting up the engine arising from the lateness of the season when he did get them, and profits he would have made by the use of the foundry, which his witnesses represented would have commenced work by the 1st November, if the defendant had delivered every thing by the 1st of October. This, however, was objected to, and the learned judge told the jury that damages were not to be estimated by such a calculation of possible profit; but that whatever injury plaintiff had sustained in taking necessary measures to supply himself with what defendants ought to have supplied, should be allowed for. This the defendants' counsel also objected to. Defendants' counsel also moved for a nonsuit, objecting that no sufficient contract was proved to meet the statute of frauds; that the contract was verbal for goods to be manufactured; that part delivery would not take the case out of the act, for the part delivery should accompany the parol contract to make it binding. Leave was reserved to move to enter a nonsuit on this objection.

The jury found for plaintiff, and £50 damages.

In Easter Term *McMichael* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, the admission of improper evidence, and misdirection.

In the following term *S. Richards* shewed cause, citing *Elliott v. Thomas*, 3 M. & W. 176; *Scott v. Eastern Counties Railway*, 12 M. & W. 33; *Rohde v. Thwaites*, 6 B. & C. 288.

DRAPER, C. J., delivered the judgment of the Court.

As to the objection under the statute of frauds, no authoity has been cited to support the proposition that to make the contract binding the acceptance by the buyer of part of the goods sold and actual receipt thereof must be simultaneous with the making of the verbal bargain; and it was not so in some of the cases cited by Mr. *Richards*. Besides, I should see no difficulty in holding this a verbal contract, the terms of which had been previously arranged, might be considered as actually made when the acceptance of part of the goods took place.

The charge appears to me to have been right; and the verdict is not unreasonable or extravagant in point of amount. The defendants in one plea deny making the agreement, in the other they assert they performed it; neither of these pleas open the defence that the plaintiff failed in making the stipulated payments, though some evidence was elected on that point during the trial; and the damages are properly in the hands of the jury.

We would not feel justified in disturbing the verdict on either of the above grounds alone; but the affidavits of the defendants Doty, expressly denying the contract, remains uncontradicted, after the attention of the plaintiff had been drawn to the point on making the rule absolute for a new trial in the other action between the same parties in which the present defendants were plaintiffs. The ommitting to answer the affidavit in this suit seems singular after what passed in the former case. The bargain was a verbal one—no memorandum was produced of what defendants agreed to furnish plaintiff—and what is mere conversation in relation to a bargain is so often taken for a bargain complete, that we feel, under all the facts of this case as they have been laid before us, that it is better to grant a new trial, but this can only be on payment of costs.

Rule absolute for a trial on payment of costs.

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## WIDEMAN V. BRUEL.

*Trespass—Boundary.*

*Trespass quare clausum fregit*, the division line between two lots being in dispute, the plaintiff proved that the line he contended for had been run by a surveyor and fenced for about 40 rods fifty years ago, and that it had been the recognised boundary between the parties. Lately defendant employed a surveyor who ran a different line (probably right, although not done in strict accordance with the statute), he having chained the width of plaintiff's lot from an undisputed boundary in front, and a similar width in rear.

Upon these facts the jury found for defendant. The court granted a new trial on payment of costs. Upon an application therefor the Chief Justice stating that "compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favourably viewed; and if moreover an actual possession of twenty years, in accordance therewith, can be shewn, it makes the plaintiff's a meritorious claim.

*Trespass qu. cl. fregit* described as about five rods in width by eighty rods in length on the south side of the west half lot No. 35, 8th concession, Markham. Pleas—1st. Not guilty. 2nd. The land not plaintiff's.

The case was tried in April last, at Toronto, before the Chief Justice of Upper Canada. The point in dispute was the line between No. 34 and 35, 8th concession, Markham. The point of commencement is undisputed, and it was proved by plaintiff that a line from that point was run by a surveyor fifty years ago; that for 40 or 50 rods back from the front a fence was put up much more than twenty years ago—some part of it soon after the survey; and that both parties have always treated that fence as a boundary line between them. The line was marked and blazed beyond where this fence is, and is easily ascertainable. On the plaintiff's side a clearing was made and a fence put up apparently not quite twenty years ago, in accordance with the surveyed line. Recently the defendant employed a surveyor who has run a different line, not strictly in accordance with the statute, but probably right as he has chained the width of plaintiff's lot in front from the undisputed monument, and has chained a similar width in rear. The defendant has removed the plaintiff's fence, and placed it upon the line thus recently ascertained. Upon these facts the jury found for the defendant.

*Bell*, in Easter term, obtained a rule *nisi* for a new trial without costs, on the grounds that the verdict was contrary



to law and evidence. He also complained of misdirection, in leaving to the jury improper and insufficient evidence as to the line contended for by defendant, and in stating that he did not think the plaintiff's evidence of the adoption of the old line by the parties on either side sufficient. He also filed affidavits shewing that the fence moved by defendant had been erected and stood more than twenty years before the defendant committed the trespass.

*McNab*, in the following term, shewed cause, filing affidavits to meet those produced by the plaintiff.

DRAPER, C. J., delivered the judgment of the court.

I am in favor of a new trial upon payment of costs. The right will be bound in this action, and the plaintiff relies on a conventional line fifty years old, clearly adopted in one part, and on a possession of at least twenty years of the part where the trespass is committed. I certainly am impressed with the belief that in respect to the true course of the boundary line, if it turned upon that, the defendant would be found entitled to prevail; but I think also that compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favourably viewed; and if moreover an actual possession of 20 years in accordance therewith can be shewn it makes the plaintiff's a meritorious claim. According to the affidavits, the plaintiff will advance much more evidence on this point.

I see nothing in the objection as to the direction given to the jury. The evidence offered by the defendant as to the true course of the line could not be withdrawn from the jury, though as they were told it was not conclusive; and the expression of an opinion upon the evidence given to the jury, with a charge which properly leaves the matter in their hands, is no misdirection.

There is no ground therefore for making the rule absolute without costs. If the plaintiff had fortified his case with the evidence shewn in his affidavits, a new trial would probably have been unnecessary. As this was a default on his part, I think he must pay the costs of the said trial.

Rule absolute on payment of costs.

## REGINA v. OGLE ROBERT GOWAN.

*Libel—Justification.*

The defendant was indicted for libel, and pleaded two pleas in justification, the gist of which were—that one G. N. had falsely laid an information on oath against the defendant, charging defendant with attempting to assassinate him by firing a pistol at him ; and secondly that said G. N. was presented for perjury for having laid this false information. It was shewn at the trial that the said G. N. had been presented by the grand jury, but not for the matters complained of by defendant, and the jury found for the Crown.

The court, upon these facts, discharged a rule *nisi* for a new trial.

An indictment was found at the sessions of Oyer and Terminer for the county of York, in October, 1854, against the defendant, for that, he intending to injure, &c., one George Nichols, and to cause it to be believed that the said George Nichols was guilty of perjury on 11th August, in the 18th of her Majesty's reign, unlawfully, &c., printed and published, and caused to be printed, &c., a certain false, &c., libel, containing divers false, &c., matters and things concerning the said George Nichols, to the tenor and effect following : “ This Nichols finding his schemes frustrated and exposed by the investigation of the Grand Lodge, went to Brockville some time after, and to prove the truth of the words of one of our best English authors, ‘ that if not victory he would have revenge,’ went before a magistrate of that place and actually swore an affidavit that ‘ I (meaning defendant) had attempted to assassinate him (meaning George Nichols), by firing a pistol at him (meaning George Nichols), while driving in a buggy waggon on the public road.’ As it so happened that I (meaning defendant) was out in a fishing boat on the river St. Lawrence, in company with two other gentlemen, when this alleged attempt at assassination was said to have occurred, I (meaning defendant) had no difficulty in having Nichols (meaning George Nichols) presented for perjury by the grand jury, and having a bench warrant issued for his apprehension, meaning that the said George Nichols had been guilty of perjury, to the great damage, &c., and against the peace, &c.”

The defendant pleaded not guilty, but the trial was postponed until the following assizes, in January, 1855, when it was again put off, defendant entering into recognizance

to appear at the following spring assizes. On the 2nd June, 1855, the defendant withdrew his plea of not guilty, and admitted publication for the purpose of the trial of the indictment, with leave to plead a special plea under the statute. And the trial was postponed at the defendant's instance until the following assizes. The justification was pleaded and *de injuria* was replied on the 4th June, 1855. On the 15th June, 1855, a writ of *certiorari* issued, removing the indictment into this court.

The defendant, on 1st June, 1855, made an affidavit, among other thing, stating that the matters stated in the indictment, as having been published by him, were true in substance and fact; that to the best of his information and belief he would be able to prove the whole of the allegations contained in the libel, by the evidence of certain witnesses, whom he named, residing in the counties of Leeds and Grenville; that there were no witnesses residing in the counties of York and Peel, who to the best of his belief, could give any evidence in the matter—the publication being admitted—that a thorough defence and investigation could not be made out of the counties of Leeds and Grenville, on account of the difficulty of procuring the attendance of some of the witnesses. That the reason he withdrew the plea of not guilty and pleaded a justification, was for the purpose of an application to try the matter at Brockville.

There were two pleas of justification. 1st. That upon the occasion in the indictments alleged, the 1st of October, 1844, George Nichols, was charged and presented by the grand jury for wilful and corrupt perjury, and thereupon a bench warrant issued against him for his apprehension in manner and from as in the indictment and supposed libel is alleged. 2nd That George Nichols, on 1st October, 1844, falsely, wickedly and maliciously went before a justice of the peace, and swore that defendant had attempted to assassinate him, by firing a pistol at him, whilst driving on the public road, and that afterwards on said 1st October, the said George Nichols was presented by the grand jury, for that he had been and was guilty of wilful and corrupt perjury, and that thereupon a bench warrant was issued against him,

to answer to the said charge: that he absconded, but came back again and spoke and published concerning defendant the same false matter already set forth: wherefore defendant, in his own defence, and in defence of his character, and in order to make known to the public the character of the said George Nichols, and that he was unworthy of belief, spoke, printed, and published, &c. The publication was stated in both pleas to have been for the public good.

In Easter Term, 18 Vic., a rule *nisi* issued from this Court on defendant's application, (dated 16th June, 1855,) to award the venire into the united counties of Leeds and Grenville, which, in the following term, was made absolute; and on September 8th, 1855, the defendant entered into his own recognizance in this court, to procure the issues joined on this indictment to be tried at the next assizes for the counties of Leeds and Grenville, and to appear in this court in the following term, and from day to day and from term to term, to receive judgment.

The trial took place at Brockville, at the fall assizes, 1855, before *Macaulay*, C. J. C. P., and the jury found for the Crown, on the issues on the pleas of justification.

In Michaelmas Term, 19 Vic., (on 22nd November, 1855), a rule *uisi* was issued to set aside the verdict and for a new trial, on the ground that the verdict was contrary to law and evidence, and on the ground of surprise and the discovery of new evidence. This rule was drawn up on reading the report of the learned Chief Justice, who tried the cause, and affidavits and papers.

The report of the learned Chief Justice shewed that the evidence for the defence altogether failed to establish that Nichols was presented by the grand jury for perjury committed before a justice of the peace, in swearing that defendant had attempted to assassinate him by firing a pistol at him, or that a bench warrant issued against him on this account. The magistrate before whom such information was supposed to have been given, negatived it, but said that in 1840, or thereabouts, Nichols laid information upon oath that two men unknown had stopped him; meaning violence apparently: that he had presented a pistol at one of them,



and that he believed Gowan had instigated them. There was some evidence to shew that Gowan had given bail to keep the peace towards Nichols, in consequence of this information. No information or recognizance could be found. A presentment was put in against Nichols for perjury said therein to have been committed in May, 1844, respecting which the learned Chief Justice observes it had no connexion with the defendant's case; so that the material part of the defence, that Nichols was indicted or presented for perjury in swearing a false charge against Gowan, was wholly unsupported. The defendant swore that he believed the verdict was found on the prosecutor's testimony: that he was not the person named in the presentment for perjury given in evidence at the trial, but that the person named in such presentment was a son of his: that this statement took defendant by surprise, and he was unprepared at the moment to shew that the prosecutor was the person named in that presentment: that since the trial the defendant has preferred a complaint against the prosecutor, before certain justices, for perjury in that particular; and that he was committed and remained a prisoner awaiting his trial on that charge; and an affidavit made by the foreman of the grand jury, at the fall assizes, 1844, that a presentment was made then against the prosecutor for perjury. There were also affidavits from four of the jurors, stating that they would probably not have convicted defendant but for the doubt whether the prosecutor was the person named in the presentment for perjury produced at the trial. This rule *nisi* was enlarged from term to term until last Hilary Term, when *S. Richards*, for the prosecution, shewed cause.

DRAPER, C. J., delivered the judgment of the court.

Before considering the other part of the case, I must observe that the affidavits made by the jurors are not admissible. The rule on this point is so well established, and the exception as to their stating on affidavit only matters which have transpired in open court, so well understood, that I am surprised such affidavits should have been offered. They escaped the attention of the court when the rule *nisi* was granted, or they would have been rejected at once.

Apart from this, we have to consider on what grounds we are asked to make this rule absolute. The defendant's affidavit states a matter of surprise, which clearly has no bearing on the case. The gist of the defence on both pleas was that Nichols had falsely laid an information on oath against the defendant, charging defendant with attempting to assassinate him by firing a pistol at him, and that Nichols was presented for perjury for having laid this false information. The defence failed on both points. The evidence of the magistrate rebutted the account given in the libel of the information, and the evidence of one of the bail who was not present when the information was given, and who does not state even that he ever saw it, fails to substantiate this part of the charge. . And there certainly was no evidence of a presentment by the grand jury against Nichols for falsely swearing such an information against the defendant. Certainly a presentment for perjury was produced, and it was, I think, sufficiently shewn that the same George Nichols, the party prosecuting this indictment, was the party named in that presentment. But as the notes of the learned Chief Justice *Macaulay* state, that presentment related to a wholly different matter. It so happens that this presentment was in my hands as Attorney-General, and my recollection accords with the observation of the learned Chief Justice as to it, and that it grew out of matters with which the defendant had no connexion.

There appears to me nothing disclosed by the affidavits which would prove either of the two material points I have referred to. No further and newly-discovered evidence of the original information, which would shew it contained a charge against the defendant, and without that was first proved, the second matter, namely, that Nichols was presented for perjury contained in that information, could not be sustained ; and as to the presentment, it is not now suggested that there was or is any other presentment for perjury than the one produced at the trial, which does not prove the statement in the pleas.

On these grounds, I am of opinion the rule must be discharged.

Rule discharged.

## GILCHRIST V. TOBIN.

*Ejectment—Statute 16 Vic., ch. 183.*

*Held*, that the assignee of property (previously sold for taxes) coming within the 8th and 9th sections of 16 Vic., ch. 183, was entitled to prevail against the sheriff's purchaser at such sale for taxes—the 12th section of that act providing that the word "owner" shall be construed to mean such person, his heirs, executors and assigns.

EJECTMENT for No. 14, 8th concession, Percy. Defence for a piece described as follows: "Commencing in front of the 8th concession at the south-west angle of lot No. 14; then north  $16^{\circ}$ ; west, 22 chains 32 links; then north,  $74^{\circ}$ ; east, 9 chains 86 links; then south,  $16^{\circ}$ ; east, 22 chains 32 links, more or less, to front of said concession; then south  $74^{\circ}$ , west 9 chains 86 links, more or less, to the place of beginning."

The trial took place at Cobourg, before *Hagarty, J.* The lot No. 14 was granted by the Crown to Mary Blucher, on 17th May, 1802. She afterwards married one John Row, and with her husband conveyed the lot to Edward T. Lawrence, by deed, dated 2nd March, 1837. Lawrence, by indenture, dated 13th October, 1851, conveyed to James A. Gilchrist lot No. 14, excepting thereout 22 acres of the south-east corner of said lot No. 14, having already been sold for taxes. And Lawrence, by indenture, dated 2nd February, 1854, conveyed to James A. Gilchrist these 22 acres, which were excepted out of the former conveyance.

It further appeared that these 22 acres had, after 13th October, 1851, and before 2nd February, 1854, been sold for taxes by the sheriff of Northumberland and Durham, under by-laws coming under the description contained in the preamble to the statute 16 Vic., ch. 183, but under circumstances that brought them within the provisions of the 8th and 9th sections of that act. Availing himself of the provisions of the 9th section, the plaintiff paid the treasurer the taxes, &c., due and obtained the certificate, and claimed that he was entitled to recover, notwithstanding the sale and the sheriff's deed, against which no objection was taken. But the defendant insisted that the right to redeem only accrued to the owner at the time of the sale for taxes, and did

not pass to the present plaintiff, and therefore there had been no redemption, and plaintiff must fail. A verdict was rendered for plaintiff, subject to the opinion of the court.

The point was argued during last term by *Armour* for the plaintiff, and *O'Hare* for defendant.

DRAPER, C. J., delivered the judgment of the court.

The last section (12) of the act referred to, puts an end to all question. The 9th section, in terms, is confined to the original owner, but the last section provides that the word "owner" shall be construed to mean such person, his heirs, executors and assigns.

The postea should be delivered to plaintiff.

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### ST. JOHN V. PARR ET AL.

#### *Trespass—Assault and Battery—Pleading.*

Assault and Battery for beating plaintiff. Pleas not guilty, and leave and license. On the argument, defendant's counsel contended that because the plaintiff had previously challenged defendant to fight, the plea of leave and license was sustained, and that plaintiff should have replied an excess or unfair advantage if he relied thereon.

*Held*, that (admitting the general principle) the facts did not support that view, and the rule was discharged.

DECLARATION filed 26th March, 1857, for trespass, assault and battery of plaintiff, breaking his leg, &c.

Pleas : 1st, not guilty ; 2nd, leave and license ; 3rd, *son assault demesne*.

The case was tried at Toronto in May last, before the Chief Justice of Upper Canada. It appeared the parties were all connected, the defendants being father and two sons, and there had been litigation, in the result of which plaintiff complained the defendants had wronged him. Last New Year's Day they all met at the post-office at Castlemore. After some angry words, the plaintiff challenged Thomas, one of defendants, to fight, and the postmaster put him out. He went to a tavern close by, and from time to time during the afternoon came to the post-office door, accompanied by others, especially one Gallagher, who seems to have been active on his side, and tried to provoke defendants to fight.



Defendants' horses and sleigh were in a shed on the opposite side of the road from the post-office. It seems that two of the defendants went into the shed (the third, their father, following), apparently to set out their horses. Plaintiff and Gallagher came towards the same place. It did not appear whether he was aware any of the defendants were there or no. While he was in the road, and, as Gallagher swore, with his hands in his pockets, the defendant, Thomas, came out of the shed and struck him on the head with a club, knocking him down, and the defendant, Henry, struck him on the legs with a whipple-tree, more than one blow. A woman also swore that she saw the defendant, Henry, strike plaintiff on the head with a bottle; her account was not very clear, or consistent with the other evidence: Gallagher picked up the plaintiff (being struck by one of the defendants while so doing), and carried him into the tavern: plaintiff was senseless: a doctor was sent for, and it was found that in addition to two or more severe blows on the head, both the bones of plaintiff's left leg were broken; his articulation is effected by the injury, and at the time of the trial the leg was not strong, and one medical witness said he thought it likely he would always be worse for the injuries in the head.

The learned Chief Justice left the case to the jury, telling them the defendant had failed to prove any license, for though he certainly was desirous of fighting, he did not thereby agree or consent that the defendants should beat him with a club and whipple-tree, and that there was no proof in support of the third plea. He discouraged heavy damages, leaving the plaintiff's very provoking conduct to the jury to be considered as it were in mitigation.

The jury gave a verdict against all the defendants for £350.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial without costs, the verdict being contrary to law and evidence, and for misdirection, the defendants having fully proved the justification, and for excessive damages.

*Dempsey* shewed cause.

DRAPER, C. J., delivered the judgment of the court.

No authority was cited on the argument, nor have I seen any which goes so far as we are asked to go, in order to hold that there was misdirection. The general proposition stated by Mr. *Eccles* may be correct, that where there is a license to do some act, and the licensee takes some unfair advantage, or commits some excess in doing the act, that should be replied. I say, that granting it may be so, it does not help the defendants, unless it can be held that a licence to fight immediately without weapons conveys such an authority—that it *prima facie* excuses the party challenged, after a considerable interval, attacking the challenger in the dark with a club and knocking him senseless, before he has the opportunity of putting himself on his defence. To make the plea available, and to compel the plaintiff to new assign, or else to fail on an issue on the plea, the evidence should have proved a trespass to which the plea was plainly applicable, and then defendant would have a right to say that is the trespass to which I have pleaded, and you have not new assigned. But here the plaintiff complains of one trespass and proves one only—and to this the license has no sort of application. No trespass appears to have been committed by defendants, coming within the license pleaded—but a trespass to which the alleged license has no application whatever—there is nothing, in truth, but one act—not licensed—not any thing in excess of what was done under cover of a license.

As to the damages, I should be glad if I could find any safe ground for interference on that ground ; but this is just one of those cases in which it is most difficult to draw a line and say what is excessive. The injury sustained by plaintiff was of a very serious, perhaps, permanent character. We cannot, consistently with authority, relieve defendants on this ground.

*Per Cur.*—Rule discharged.

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## TILT V. JARVIS ET AL.

*Trespass—Ratification.*

When a sheriff, acting under a valid writ as a servant of the court seizes the wrong person's goods, a subsequent ratification by a party who, until such ratification, was a stranger to the taking, cannot alter the character of the original taking, and make such party a trespasser by relation.

The leading facts of this case appear in the report in 5 U. C. C. P. 486, when the verdict previously rendered for plaintiff was set aside, and a new trial granted without costs.

At the last trial at Toronto, in October, 1856, before *Burns, J.*, some additional facts appeared, supplying proof on points before not clear or not established.

A warrant to the sheriff's bailiff was put in, with an inventory attached thereto, shewing that before the 5th of April, 1855, seizure of all the goods for which this action is brought under two writs of execution against Stephen Stroud: one at the suit of one Price, the other at the suit of Jacques and Hay. It was stated by the sheriff's bailiff that the Ewarts had issued a writ of attachment against the goods of Stroud, which was received in the office on the 2nd of May, 1855. This writ was not produced, nor was there any evidence that it was acted under, except that the bailiff swore that the sale, on the 10th of May, on the two executions, amounting only to £85 8s. 2d., (in the former report it is said to be £65 8s. 2d., which seems correct,) would have been stopped when that sum and the expenses, (£13 5s. 7½d.) were produced, if the Ewarts had not promised to give the sheriff a bond of indemnity, and that on this account everything was sold, producing £156 19s., and afterwards, and after payment to the Ewarts, a balance was paid over to Stroud's agent. The plaintiff had given notice of his claim before the sale; he was present at the sale, but the bailiff could not swear he forbid it then, and one article was knocked down to him, though he did not complete the purchase. It was proved on the defence by the deputy sheriff that the plaintiff consented to the sale taking place. To the selling all the property, expecting to obtain the money produced, claiming that all the goods were his by the bill of sale. The sheriff was indemnified by

all the creditors, but the Ewarts gave no bond of indemnity until the 8th June, 1855, and they did not get the money out of the sheriff's hands until after the 17th of July, when Stroud confessed judgment in the attachment suit, and on the 27th of July, *fi. fa.* was given to the sheriff found thereon, and he paid the Ewarts the sum recovered by them.

The learned judge left it to the jury to say whether the bill of sale to the plaintiff was fraudulent or no. No question arises upon this. There was sufficient evidence to maintain it, and the jury have on both trials determined that it was *bona fide* and valid.

The remaining question was, whether the Ewarts were shewn by the evidence to have been trespassers. The learned judge directed that the evidence shewed they adopted the sheriff's act, and received the benefit of it; that before the sale they had promised to indemnify the sheriff, and did after the sale and before they obtained the execution, give a bond of indemnity, and that they might be liable by relation. He had previously observed that he considered that the plaintiff's consent to the sale would not prevent his recovering if he had not assented to the sheriff's going on to seize; that he might suppose a sheriff's sale as good a way of converting the goods into money as any other, and that he consented to it, reserving his legal rights.

On this direction the jury found for the plaintiff, with £146 19s. damages. The defendant's counsel objecting to that part of it which stated the Ewarts could be viewed as trespassers by relation.

In Easter Term, *Helliwell* obtained a rule *nisi* for a new trial on the grounds of misdirection, and that the verdict was against law and evidence.

The rule was enlarged until this term when *Helliwell* supported it, but no one appeared for plaintiff to shew cause.

DRAPER, C. J., delivered the judgment of the court.

I think there is no sufficient reason that the validity of the bill of sale to the plaintiff should be subject to further question. The evidence was ample to sustain its *bona fides*, and the jury have twice affirmed it.



All therefore depends on the question whether the Ewarts were trespassers. As I understand it the plaintiff claims to treat them as trespassers by relation to the first seizure by adopting and ratifying that act, and so rendering themselves liable to its consequences.

But I take the law to be otherwise, and is so laid down by *Tindal, C. J.*, in *Wilson v. Tumman et al.*, 6 M. & Gr. 236. He states that both under the authorities, and upon the reason of the thing, where the sheriff, acting under a valid writ by the command of the court, and as the servant of the court seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action ratifying and approving the taking, cannot, upon a distinction previously taken, alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action. A subsequent ratification of an act done by another assuming to act for the party ratifying, though truly without his authority, is binding; but if the act itself was done either for the benefit of the party doing it, or of some other person who gave him authority, the subsequent ratification of such act by a party who, until the ratification, was a stranger to the proceeding, and whose benefit or authority was never contemplated in it, is not to be taken as a previous command. The rule as to ratification operates on the acts of one who professes to act by the authority, or on behalf of him who ratified, and to make the ratification binding, it must be equivalent to a prior command, which, it is held, can only be where the party doing the act professes to be the agent of, or to have authority from, the ratifier, and this, as I conclude from the authorities, is the true sense of the maxim *omnis ratihabitio retro trahitur et mandato priori æquiparatur*.

I do not think, therefore, that the defendants, the Ewarts, were proved to be trespassers by the original seizure of the goods, nor were they in fact seized under their attachment at all.

Some stress, however, seems to have been laid on their indemnifying the sheriff. The sale was on the 10th of May. The bond to indemnify was not given until the 8th of June

It is conditioned to indemnify the sheriff from 'all loss to accrue by reason of the seizure or sale of the goods, or in respect of any seizure, sale, levy or proceeding for enforcing the attachment. The bond being retrospective so far as any seizure, levy or acts under said execution, that may have already taken place by reason of the sale of the said goods or which shall in any manner happen by reason of the said writ of attachment.

The bailiff's declaration that he would not have proceeded with the sale unless for the Ewart's promise to indemnify shews certainly a *quasi* command to sell goods already seized, and I am not prepared to decide that it does not afford evidence of a trespass, a new taking of the goods sold after the prior writs were satisfied. But this is to be considered in connection with the deputy sheriff's assertion that the sale proceeded at the request, or at least with the consent of the plaintiff, who adopted that mode of turning these goods into money, asserting his own right to the money thus produced. The matter has never been submitted to the jury in this light, and we cannot, I think, assume, that they must have rejected the evidence of the plaintiff's agent, or that it would not have materially effected the question of the Ewart's liability as for a trespass in the taking and selling those goods which remained on hand after a satisfaction of the two writs of *fi fa*.

As to the sheriff, it is now sufficiently proved that he seized under these writs of execution, and as to him, though the receipt by the plaintiff of the money, the proceeds of the sale of the goods, might have operated as an accord and satisfaction of the first trespass ; yet, looking at all that has happened, the plaintiff as against him, has so far as I see at present, a right to recover, that is, assuming the *bona fides* and regularity of the bill of sale. But he has, I think, failed altogether, as to the Ewarts upon the case he relied on at the trial, and as I think the direction as to their liability by relation to the original seizure cannot be maintained, I am of opinion there should be a new trial without costs.

Rule absolute.

## IN RE. JONES EX PARTE KELLY.

*Garnishee order—Notice of Assignment of debt.*

Although an order upon a garnishee under the common Law Procedure Act, 1856, is not intended to have operation upon debts of which the judgment debtor has already divested himself by assignment; yet, where such assignee had neglected to give the garnishee precise and distinct notice of the assignment, and his attorney stood by whilst such order was made, and the garnishee had paid the debt to the judgment creditor, the court relieved the garnishee from further proceedings taken at the instance of the assignee in the name of the judgment debtor.

*Jones* (on 26th August, 1857,) obtained a rule *nisi* to set aside the order of *McLean*, J., made in the Practice Court during last Easter Term, making the order of Sir *J. B. Robinson*, C. J., of the 16th of April last a rule of court, and the rule of court made in pursuance thereof, and all subsequent proceedings thereon, and that Kelly should pay the costs.

The grounds relied on were, that the order of Mr. Justice *McLean* was made after Sir *J. B. Robinson* had made a garnishee order affecting all moneys in the hands of Jones, and after another order had been made by Mr. Justice *Hagarty*, ordering those moneys to be paid to one Samuel Jackson, the judgment creditor named in the garnishee order, by Jones, of which Kelly had full notice, as also that Jones had paid those moneys to Jackson.

The matter out of which this application grew was an order of Sir *J. B. Robinson's*, made on the 6th of April last, that Jones, within a week from that date, should render to Kelly his bills of costs for fees and disbursements for professional services to Kelly; such bills to be referred to the Master for taxation; and that Jones should pay over any balance found due by him, if any, on such taxation over and above the sums received by him from Kelly, also the costs of that application.

Under this order the Master, on the first of June, 1857, certified that £7 15s. 4d. was due from Jones to Kelly.

Before this certificate was given Jones paid the costs mentioned in the order of the 6th of April, amounting to £3 3s. 5d., on the 14th of May, 1857, and took a receipt from Mr. McIntyre, Kelly's attorney.

On the 4th of May, Mr. Justice *Burns* discharged a

summons granted on the 27th of April, between these same parties with costs, and he further ordered, that the Master should tax the costs of the taxation of Jones's bills against Kelly, and certify the amount thereof; and that the costs taxed to Jones on the present order discharging the summons should be deducted from any amount due Kelly.

The costs of the taxation of Jones's bill were £1 7s. 6d., as appears by the Master's certificate of the 9th of May; Jones also paid these costs to McIntyre.

The costs taxed on the order of Mr. Justice *Burns* discharging the summons of the 27th of April were stated in the Masters certificate of June, 1857, to amount to £3 8s., which being deducted from the £7 15s. 4d., found due by Jones to Kelly, left a balance due to Kelly, under Sir *John B. Robinson's* order, of £4 7s. 4d.

On the 18th of April, 1857, Mr. Justice *Hagarty*, in pursuance of a summons issued by Sir *J. B. Robinson*, between Samuel Jackson judgment creditor, and James Kelly, judgment debtor, and the said John Robert Jones, garnishee; order that any balance that might be found due to the judgment debtor by the garnishee, (after deduction of his general bill of costs for professional services rendered to said judgment debtor,) should be paid to the judgment creditor. This was served upon Jones on the day of its date, and the copy so served was shewn to Mr. McIntyre by Jones, a day or two after it had been made.

Jackson's attorney makes an affidavit, that he learned from McIntyre that there were moneys due from Jones to Kelly, upon which information he applied for and obtained the garnishee order.

Jones swore he paid the money under the garnishee order about the 6th or 7th of June, and long before the rule of court on this matter was served on him; meaning, I presume, the rule of the Practice Court of Easter Term last, dated 13th of June, 1857.

An affidavit of Mr. Morphy, was also put in, stating that he acted as agent for the attorney of Jackson in obtaining the garnishee order, and that McIntyre was in Chambers when the application was made for the order, and when it was granted.



Jones swore, that when the summons for the garnishee order was served on him, and the day before such order was made he went to McIntyre and informed him of it, and that said summons was returnable the next day, and that McIntyre was present when the summons was moved absolute, and had a full opportunity to shew cause against it, and that when Mr. Morphy was drawing up the order, and before it was signed, he shews it to Mr. McIntyre in Chambers. He also swore that all he knew about Ketchum having any thing to do in this matter was from a casual remark made by Kelly a few days before the application for his bills of costs, when he said that Ketchum had the settlement of his affairs; in consequence of which he (Jones) gave McIntyre, as attorney for both Ketchum and Kelly, notice of the garnishee proceedings; the first knowledge of which, Jones swore, was given to him by Mr. Morphy when he was in court (Chambers?) with his affidavits for the purpose of applying to garnishee the moneys belonging to Kelly. On the 13th of June, McIntyre demanded the costs taxed on the rule in the Practice Court, the moneys found due to Kelly on the Master's certificate, and threatened to proceed by attachment if Jones would not pay the same.

*McIntyre* shewed cause.

DRAPER, C. J., delivered the judgment of the court.

The matter disputed in the affidavits filed by him, related principally to McIntyre's alleged knowledge of the obtaining of the garnishee order, and of Jones's knowledge that Ketchum had a right to these moneys, and should have set that up to prevent the garnishee order; but abstained from doing so with a view to injure Ketchum.

It appeared that on the 12th of February, 1857, Kelly, by writing, requested Jones to pay to McIntyre the amount of the judgment obtained against J. J. Nichol and Robert Nichol in his favour and the witness fees. This order, McIntyre swore was presented some weeks before the 31st of March, 1857, and Jones said he would look into the matter and see how he stood with Kelly; that some money must be due to Kelly. McIntyre also swore that Jones

spoke to him about a garnishee order served upon him for the amount due by him to Kelly, but shewed no order (1 copy thereof; that McIntyre informed Jones that such order would not have been made if the learned judge had been told by Jones that the money was Ketchum's, and that Kelly was only a nominal party.

In another affidavit, McIntyre swears that he met Jones in the street on the 17th of April, 1857, and Jones told him the amount coming from him was garnisheed; but Jones gave him no intimation to oppose it; that Jones led him to believe the order was actually served; that on the 18th of April he went to Chambers on other business, and Mr. Morphy exhibited a paper at some distance, and said, "that money you want of Mr. Jones is garnisheed;" that he (McI.) could see the paper purported to be signed by a judge; but could not say whether it was a summons or an order; that no party served any copy of a garnishee order or summons on him; that immediately after what happened in Chambers, he caused a notice to be served on Jones, not to pay any money due by him to Kelly or any one but himself or Jesse Ketchum, Jr., "as the same was assigned to Jesse Ketchum, of which you were made acquainted before the application was made against you," and that if he paid it to any one else he would be required to pay it again. This was served on the 18th of April, 1857. He denies being present when the garnishee order was argued, and believes the order must have been signed before he came into Chambers, and that Morphy exhibited the *order or summons* to him just before he took his seat.

He also swore, that on the 17th of April he told Jones that he (Jones) knew Ketchum was to receive the money, and that Kelly was only nominally connected with it, "of which he was perfectly aware."

Ketchum swore that Kelly was in his debt over £3000 in 1856. That Kelly made an assignment "of all debts due him in Ketchum's favour," and among other debts he assigned the amount due from Nichol, and wrote the order in favour of McIntyre because McIntyre was Ketchum's solicitor; that Jones was perfectly aware the amount was to be collected

for Ketchum's benefit, and that Kelly was only nominally connected therewith before the application was made against Jones. Ketchum swears he believes Jones intentionally withheld from the judge the fact of Ketchum's claim to the money.

Kelly swore that he made an assignment to Ketchum before Jackson recovered judgment against him; that he informed Jones that the order on McIntyre for Nicholl's money was for the benefit of Ketchum; that he (Kelly) could not receive any money from Jones, as it belonged to Ketchum, and that Jones had a perfect knowledge of the fact that Kelly was only nominally interested in it, and Jones might have informed any one who applied for a garnishee order to this effect.

I am very desirous to do what I can to stop further costs and vexations proceedings about this miserable sum of £4 or £5. More than twice or thrice the amount must have been already spent in the dispute.

Mr. Jones unquestionably is proved to owe the money to Kelly, and the application under which the debt is ascertained, is one against him as an attorney, of a summary character, capable of being enforced by attachment, and the making the Chief Justice's order a rule of court, is a step at once subjecting Jones to the costs attending it, and the foundation for an application for the attachment. Putting aside for the moment all consideration arising from the alleged assignment to Ketchum, how does the matter stand? Jones owes Kelly £4 7s. 4d., which by the Chief Justice's order he was bound to pay, and might be attached for default. But while this money remains in Jones's hands, Jackson, a judgment creditor of Kelly's, applies under the 194th section of the Common Law Procedure Act, of 1856, and gets a summons. We have nothing before us of these proceedings except the order of my brother *Hagarty*, which is drawn up on reading the summons, calling on Jones to shew cause why he should not pay to Jackson the debt due from him to Kelly, and orders such debt to be paid over to Jackson. I presume that an attaching order of all debts owing or accruing due from Jones to Kelly had been granted, as well as the

summons. On the return of the summons my brother *Hagarty* made the order for payment, and Jones subsequently paid the amount to the judgment creditor of Kelly. Nothing, I think, can be more clear, than on this state of facts Kelly could not be permitted to go on and demand in his own name, and for his own benefit, this same sum, and take proceedings to put Jones to costs, and finally to attach him for not paying it over a second time to him. If all this and nothing more appeared, we should, I think, make the rule absolute, setting aside all the proceedings taken by Kelly after the garnishee order, with costs.

But it is urged that the proceedings taken and proposed to be taken in Kelly's name, are not for his benefit, but for the benefit of Ketchum, to whom Kelly had long before the garnishee order made an assignment of his effects, including this claim. That Jones was aware that the money he had collected from the Nicholls on Kelly's behalf, belonged to Ketchum, and that the order of 12th February, drawn by Kelly in favor of McIntyre, was so drawn that Ketchum might get it. That he should have shewn this for cause against the order being granted by my brother *Hagarty*, and cannot set up this neglect of his own in answer to Ketchum's claim, and to his prejudice. See *Watts v. Porter* 3 E. & B. 743; *Westoby v. Day* 2 E. & B. 605; *Holmes v. Tutton*, 5 E. & B. 65; *Hersch v. Coates*, 18 C. B. 757.

It has been held in *Hersch v. Coates*, that an order upon a garnishee under the 61st section of the English C. L. P. act, 1854, of which the 194th section of our C. L. P. act, 1856, is a transcript, has no operation upon debts of which the judgment debtor has already divested himself by assignment. And treating that decision as good law, we must consider its application to the present case. There the assignment was known by the garnishee, and was set up by him in answer to the judgment creditors' application. The judge, however, made an order on him to pay, and the court set it aside, assuming the assignment to be established.

The present case differs in some respects. I do not find *any precise* statement of *notice of the assignment* set up by Ketchum, having been given to *Jones* before the



garnishee order was made. The only affidavit before us, which was made before the order of the 6th April, was sworn on 31st March last, and in that Mr. McIntyre, though referring to the draft of the 12th of February, 1857, does not make any reference to Ketchum. The notice served on Jones on the 18th of April, after the order on Jones to pay to Jackson, not to pay to any one but McIntyre any money due to Kelly, it is said, "as the same was assigned to said Jesse Ketchum of which you were made acquainted before the application was made against you;" an expression which can have no effect unless such previous acquaintance was shewn. But neither Ketchum, Kelly, or McIntyre, swears that notice of any actual formal assignment, stating when it was made, its purport, &c., &c., ever was given to Jones at all, or any thing more than that Kelly told Jones that the money coming from him belonged to Ketchum, and that he Kelly could not receive it, not saying how or why it belonged to Ketchum, or that there had been any regular or valid assignment. Even now this is not shewn to be the case, or that any effectual binding and legal transfer has been made by Kelly to Ketchum.

Admitting that if the facts had been all known to Jones as they appear now, I doubt whether they would have constituted good cause against the order of the 18th April. But I really do not doubt that if he had advanced all that it is proved by these affidavits he then knew, it could have no effect in stating or preventing that order; and if, as Mr. McIntyre admits, he received a communication relative to the proceeding from Mr. Jones on the 18th of April, it surely was his duty to have informed him of the fact of an assignment, which, as Ketchum's solicitor, he must be presumed to have known.

I do not therefore, on all the affidavits, feel warranted in saying that Jones had such a knowledge that he could have set up the assignment, and that his not having done so establishes either laches or collusion with the judgment creditor, or that enough appears to sustain an application to set aside the order of my brother *Hagarty*, if it were moved against as in *Hersch v. Coates*.

I conclude, therefore, that Mr. Jones is entitled to be protected in the payment he has made, and that this rule should be made absolute with costs as prayed.

Rule absolute with costs.

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GREY V. DAYFOOT ET AL.

*Laches—New Trial—Costs.*

Where the court granted a new trial to enable a defendant to tender evidence which had been excluded on the first trial in consequence of the laches of his attorney or himself, in not giving a sufficient notice to produce, the court imposed upon the defendant the terms of payment of costs of the first trial

TRESPASS *qu. cl. freg.* lot No. 18, 11th concession, Denham, tried at Woodstock in May last, before *Burns, J.* The plaintiff's case was clearly proved; and the defence relied on was leave and license. For establishing this, the contents of a document in the plaintiff's hands were relied on, but the plaintiff did not produce it, and the defendants had not taken sufficient care in giving notice to produce, so as to be in a situation to give secondary evidence, and consequently a verdict passed for plaintiff with £100 damages.

In Easter Term last the defendant's counsel obtained a rule *nisi* for a new trial on affidavits, one explaining the absence of proper notice, and one from each defendant swearing to the existence of an indorsement on a bond in plaintiff's possession, and by which bond and the assignment thereof to him by one of defendants, he, the plaintiff, had been enabled to obtain a conveyance of the land, and that in such indorsement there is contained a reservation to one of defendants of the very timber for cutting which this action is brought. It is further stated that the plaintiff himself executed a document containing a recognition of defendant Dayfoot's right to cut and take away the timber, which document was in the custody of a party who died suddenly, and has not yet been found.

The plaintiff, on shewing cause, did not meet these assertions or offer any affidavit at all.

If the facts sworn to are true, and the plaintiff by foregoing the opportunity of answering them, must for the purpose

of this application, be taken to admit them, the verdict is manifestly unjust, and should be set aside. But inasmuch as there was a want of proper attention to the defence, an omission to serve the notice requisite to let in secondary evidence in sufficient time, and that omission is not accounted for in a manner which altogether relieves the attorney from blame, we can only relieve the defendant on payment of costs, and make the rule absolute on those terms.

Rule absolute on payment of costs.

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BARCLAY V. ADAIR.

*Excessive Damages.*

The court will not ordinarily interfere with the amount of the verdict given by a jury, unless the damages are manifestly extravagant, or unless some wrong element has been admitted in the computation of them or there is reason to attribute partiality or other improper motive to the jury, and in case of such interference the court will impose equitable conditions on a defendant seeking relief.

TRESPASS *de bonis asportatis*. Pleas—1st. Not guilty. 2nd. Goods not the property of the plaintiff. 3rd. Leave and license.

The case was tried in March last, at Goderich, before Hagarty, J. The plaintiff had a retail store at Port Albert; the defendant was a merchant in Goderich, and had sold goods to the plaintiff to a considerable amount. In August, 1855, the defendant was informed that plaintiff had absconded, and he went over to Port Albert to look after his interests. He found a clerk of the plaintiff's, a lad only eleven years old, in possession of the key of the store, and went to the store of plaintiff, which being opened by the clerk, the defendant, with the help of the clerk and of his brother, who was a livery stable keeper, not in any way concerned in plaintiff's business, took an inventory, packed up the goods, and removed the larger part of them to the defendant's warehouse in Goderich, to secure or pay himself. Some things, shovels, spades and stoves, were put into another building, and were not inventoried, and some goods were left behind in the plaintiff's store. The defendant asserted at the time that most of the goods came from him. The inventory was not com-

pleted until the goods had been taken to defendant's warehouse. The clerk told the prices as far as knew them. After getting possession of the goods, the defendant sent a person with the inventory to the plaintiff, who was then at Detroit, to procure the plaintiff to sign it, and confirm the transfer of the goods to defendant in satisfaction of defendant's claim. According to defendant's valuation the goods included in the inventory made by him were worth £149 0s. 3½d. A clerk in a merchant's store in Hamilton swore the cost price at Hamilton would be £193 2s. 10d., and that five per cent should be added for costs and charges to Port Albert. Part of these goods had been purchased, as this witness stated, from Watkins & Co., at Hamilton, and were still unpaid for. The plaintiff was a young man little over 21. He returned to this province soon afterwards, and then made an assignment of his estate and effects for his creditors; but the defendant did not come in under this assignment. This witness also stated that about 33 per cent. above charges should be added to the first cost, to shew the retail value of the goods at Port Albert. The defendant called no witnesses, and the learned judge told the jury that they were not necessarily limited to the precise value of the goods, but might give such further temperate damages as they might think just. That they must estimate as well as they could the number and value of goods not included in the inventory, and which there was some evidence to shew defendant had taken possession of, though he did not apparently remove them to Goderich with the residue. The jury found for the plaintiff, and damages £400.

In Easter Term *J. Wilson* obtained a rule *nisi* for a new trial, on the ground of excessive damages, and of the discovery of new evidence, stated in affidavits, or to reduce the verdict to such an amount as the evidence sustains. The defendant's affidavit denied getting any other goods than those he removed to Goderich, and asserted the verdict was more than double the value of those which he did get. He also asserted the discovery of the evidence of one Greig, whose affidavit set forth that he had assisted in the valuation and measurement of the goods when brought to Goderich; that



£140 was their extreme value. He details some conversation with the plaintiff's clerk, not of much importance, considering his youth and inexperience; and that after the assignment was made he saw plaintiff, who expressed his satisfaction at the defendant having obtained the goods in satisfaction of the debt; but stated he considered the valuation too low. That plaintiff's first objection to the proceeding was made after the assignment made by him. Another witness, a clerk of defendant's, swears the goods were not worth £100.

*C. Robinson* shewed cause, filing an affidavit from plaintiff's clerk, denying the statements contained in the affidavit of Greig. He cited *Flint v. Bird*, 11 U. C. Q. B., 444; *Maxwell v. Crann*, 13 U. C., 253. *Rogers v. Spence*, 13 M. & W. 571.

DRAPER, C. J., delivered the judgment of the court.

Unless the damages are manifestly extravagant, or unless a wrong element has been admitted in the computation of them, or there is reason to attribute partiality, or other improper motives to the jury, we should not interfere. As was said by the Chief Justice in *Flint v. Bird*: "The defendant should have given evidence as to the value, if he did not acquiesce in the valuation made by the plaintiff's witnesses." Instead of doing this, he raised a very groundless objection to the form of action, and chose to rely on it, calling no witnesses. The Court of Common Pleas in England upheld a verdict, when £300 had been given, though the apparent loss sustained by the plaintiff did not exceed £200, (*Williams v. Currie*, 1 C. B. 841), and *Maule, J.*, observed that if the jury were restrained to exactly the amount of injury sustained by the plaintiff it would in effect place a wrong-doer on precisely the same footing as one who enters with the owner's permission. The defendant has no right to claim to have the price fixed at what he would have been willing to pay for the goods as a purchaser. As to the evidence which the defendant now advances, it is not evidence of the existence of which he was ignorant; but he said he did not know where his witness was

then resident. He does not state any enquiry was made after him, and if there had been any, it would have been a ground for an application to put off the trial, rather than to set aside the verdict. No such application was made, and probably no such enquiry, as the defence was rested on a legal objection.

On the whole, though I should have been much better satisfied with a smaller verdict, I feel great difficulty under the circumstances, in interfering with the undoubted province of the jury in the estimate of damages. The plaintiff, it is true, stands in no favourable light, and has probably little interest in this action, which is apparently for the benefit of his creditors ; but the defendant is clearly a wrong-doer, in the mode in which he has striven to obtain an unfair advantage over them, instead of coming in *pari passu* with them, as by adopting legal proceedings he might have done, and as he has since refused to do.

The affidavits now shew to us that the articles not inventoried, and the value of which probably formed a considerable item in the verdict, were really of small value, and some were in fact not plaintiff's property, and as the verdict exceeds any value that upon the fullest computation could be put upon the goods, including the articles above referred to, my brothers think the case should be submitted to another jury on payment of costs. I yield to their views, though not without some hesitation, in making the rule absolute on payment of costs, and on condition that plaintiff might go to trial at the next assizes, giving four days' notice, and if he desires, two days' notice of countermand ; and if defendant has not paid the costs before the trial, plaintiff shall not forfeit the costs by going on, but may enforce them by the usual summary proceedings.

Rule absolute on payment of costs.

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## EMERSON V. FLINT.

On *sci. fa.* to render liable for the debts of the company, the individual members of a company formed under the 16 Vic., ch. 191, intituled, "An act to authorise the formation of joint stock companies to construct works necessary to facilitate the transmission of timber down the rivers and streams in Upper Canada."

*Held*, that in the absence of any express provision in such act, they are not so liable, and even if they were, *quære* whether they would not have been exempted by the operation of 12 Vic., ch. 10, sec. 5, sub-sec. 24.

The *scire facias* recites a judgment recovered by plaintiff against the Moira River Navigation Company, "being a public registered company, formed for the purpose of carrying on business in Upper Canada," under the provisions of the statute 16 Vic., ch. 191, entitled "An act to authorise the formation of joint stock companies to construct works necessary to facilitate the transmission of timber down the rivers and streams in Upper Canada," and set forth that plaintiff had issued execution on that judgment, but had recovered no satisfaction; that the defendants at the time, &c., were members of the said company, and then had subscribed in duplicate an instrument according to the form in the schedule in the said statute mentioned, and then were and still are a joint stock company, for the purpose of constructing works necessary to facilitate the transmission of timber down the river Moira under the provisions of the said statute; and defendants are commanded to shew cause why plaintiff should not have execution against these defendants to recover the amount of the judgment according to the form and effect thereof, and of the statute aforesaid.

The defendants demur, assigning for causes,—

1st. That they are not parties or privies to such judgment.

2nd. That the plaintiff claims execution against them by virtue of some statute, and there is no such statute in existence; meaning, I suppose, no statute giving him the right to issue the execution prayed for.

3rd. That in law the above writ of *scire facias* does not lie against defendants.

4th. That the *scire facias* discloses no cause of action against defendants.

*Bell* (of Belleville), supported the demurrer.

No one appeared on the other side.

DRAPER, C. J., delivered the judgment of the court.

The statute recited and referred to on the *scire facias* is 16 Vic., ch. 191. By section 4, it permits any five or more persons who associate themselves as a company, and who comply with the requirements contained in the proceeding sections of the act to become, and in effect it constitutes and creates them, "a chartered and incorporated company," with the usual corporate powers of suing and being sued, having a common seal, acquiring, holding, and departing with lands, and vests the works constructed and the materials provided for their construction "in such company, and their successors." The 5th section gives every "company incorporated under this act" the power of making by-laws under certain restrictions. The 6th section provides for the management of the property and affairs of the company by five directors, to be elected by the stockholders, each of whom shall be entitled to one vote for every share he holds. Section 8 fixes the amount of each share at £5, and makes the shares personal property and transferable on the books of the company. Sec. 35, enacts that unless the works are finished by such company "within two years from the day of their becoming incorporated under this act," they shall forfeit the corporate and other powers, &c., conferred upon them. The 28th section also speaks of such companies as corporations.

There is no provision in this statute similar to that contained in 13th & 14th Vic., ch. 28, sec. 17, making the stockholders individually liable for certain claims. Nor is there any interpretation clause as in the Railway Clauses Consolidation Act (14 & 15 Vic., ch. 51).

Then there is the Interpretation Act, 12 Vic., ch. 10, sec. 5, sub-sec. 24, enacting that words making any association or number of persons a corporation or body politic and corporate, shall be construed, among other things, "to exempt the individual members of the corporation from personal liability for its debts, or obligations, or acts, provided they do not contravene the provisions of the act incorporating them."

Without referring to the last cited act, and looking only



at the statute under whose provisions the company of which the defendants are said to be stockholders, was created, I see no ground on which we can hold that the defendants are individually liable; and if the Interpretation Act applies, and I see no reason why it should not, they are exempted from liability, unless under circumstances which are not alleged in the present case. See *Andrews v. Marris* (1 Q. B. 3), *Clark v. Woods* (2 Ex. 395).

In my opinion the defendants are entitled to judgment on demurrer.

*Per Cur.*—Judgment for demurrer.

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### GIBSON V. THOMAS, SHERIFF.

The provisions of the 10 & 11 Vic., ch. 15, sec. 5, as to gaol limits apply to cases in which county court *ca. sas.* are issued under 14 & 15 Vic., ch. 52. to the sheriffs of other counties than that in which judgment has been obtained; when therefore, the bond to the sheriff, authorized by 13 Vic., ch. 175, sec. 7, had been given, and the justification, the filing and county court clerk's certificate had been obtained in the court of the county where the *arrest* had been made, and not in the county of B. from the court of which the *ca. sa.* had been issued, the proceedings were held to be regular, and the sheriff discharged.

The following special case was submitted to the opinion of the court:

#### CASE.

Action for escape of Thomas B. Burrows, arrested by defendant as sheriff of the county of Wentworth, under a writ of *capias ad satisfaciendum* issued out of the county court of the county of Brant, on a judgment recovered in that suit by the plaintiff against the said Thomas B. Burrows.

*Pleas*—1st. Not guilty. 2nd. That defendant took bond for the limits according to the statute; and that within the month certificate delivered under the statute. 3rd plea to same effect as second plea—issue taken by plaintiff. The case was tried at the last assizes for the county of Brant before *Burns, J.*, when the jury found for the plaintiff, and £63 4s. 10d. damages, subject to the opinion of the court on the following statement, and admissions made at the trial and entered on the judge's notes.

It was admitted by the parties that defendant Burrows

was arrested by the sheriff on a *ca. sa.* on 28th December, 1855, at the suit of plaintiff, issued from the county court of Brant; that on the arrest defendant, Burrows, gave the required bond to the limits (under 16 Vic., ch. 175, sec. 7), dated and delivered to the sheriff 28th December, 1855: that on 21st January, 1856, bail was put in in the county of Wentworth, and the certificate of the clerk of the county court of Wentworth, that the bail was put in within the month, and filed there—that is, in Hamilton—delivered to the sheriff on 21st January, 1856 (see 16 Vic., ch. 175, sec. 8): That notice of that bail was served on the plaintiff's attorney on the 26th January, 1856, and service of it admitted. That defendant, Burrows, was not in close custody under the *ca. sa.* subsequent to the first arrest on 28th December, 1855.

The defendant contended plaintiff cannot recover—1st : sheriff is not liable for an escape after having taken a bond on 28th December, 1855.

2nd. That the certificate of the clerk of the county court of the county of Wentworth discharged the sheriff, and he is not liable for an escape after that.

The plaintiff referred to 13 & 14 Vic., ch. 52, sec. 3, bail not put in in the right county.

The 10 & 11 Vic., ch. 15, sec. 5, only applies to cases as the law then stood; and as it then stood no *ca sa.* could issue from the county of Brant to the county of Wentworth.

The 13 & 14th Vic., ch. 52, sec. 3, gave the county courts power for the first time to send *ca sas.* from one county to another. Did that introduce the provisions of 10 & 11 Vic. ch. 15, so as to enable a party to put in bail and file it in Wentworth, (the *ca. sa.* having issued from Brant,) and make the certificate of the clerk of the county court of that county (Wentworth) sufficient for the sheriff to act upon? Or, should the bale piece have been filed in Brant, and the clerk of the county court of that county certify as being the county wherein the judgment is entered up.

The 16 Vic. ch. 175, sec. 8, provides that if a defendant after giving bond to the sheriff, shall deliver to such sheriff the certificate of the proper officer of the court, that the recognizance of bail, &c., is duly filed, and his surities

shall be discharged from liability for a breach subsequently occurring of the condition of the bond.

Who is the proper officer in this case ? The clerk of the county court of Brant, or of Wentworth ?

If the court shall be of opinion that the bail piece in the said *ca. sas.* could be properly and regularly filed in the office of the clerk of the county court of the county of Wentworth, and the certificate of such filing be properly given by the said clerk, or that the said sheriff is not liable to be sued in an action for escape after the defendant has given the bond mentioned in the 7th sec. 16 Vic., ch. 175, then the verdict is to be entered for the defendant ; but if the court shall be of a contrary opinion, and that the recognizance of bail pieces should be filed in the county wherein the proceedings have been carried on, and the judgment entered and *ca. sa.* issued ; and that an action will lie against the sheriff for an escape notwithstanding he has taken the bond mentioned in the 7th sec. 16 Vic., ch. 175, after the expiration of a month from the taking of such bond, then the verdict aforesaid is to stand and be entered for the plaintiff.

*M. C. Cameron* for plaintiff.

*Sadlier* for defendant.

DRAPER, C. J., delivered the judgment of the court.

B. was in the custody of the sheriff of Wentworth, on a *ca. sa.* issued from the county court of the county of Brant. He gave the bond to the sheriff (on the day of his arrest, 28th December, 1855), authorised by statute 16 Vic., ch. 175, Sec. 7, conditioned that he, B., would not depart the gaol limits of Wentworth. On the 21st January, 1856, B. entered into a recognizance with two sufficient sureties under the statute 10 & 11 Vic. ch. 15, sec. 5, conditioned among other things that he, B., should remain and abide within the limits of the gaol where he was arrested. This act, 10 & 11 Vic., requires that "such recognizance shall then be filed in the office of the clerk of the district court of the district in which the arrest was, or may be made," and upon the production to the sheriff by whom the said arrest was made, of a certificate of the clerk of the district court of such

district ;" that such recognizance, &c., have been filed, the sheriff may admit the party arrested to the limits, and the sheriff shall be discharged from all responsibility respecting such party after such admission to the limits, unless he be again committed to close custody. Now according to the facts stated so far as the putting in bail to the limits is concerned, the justification the filing and obtaining the certificate of such filing from the clerk of the district (now county) court of the district (now county) in which the arrest was made, have each been fulfilled to the very letter of the provisions of the 10 & 11 Vic., ch. 15, sec. 5. But it is said that this act only applies to cases as the law stood when it was passed: that is, to cases in which the *ca. sa.* is directed to the sheriff of the county in the county court of which the judgment is entered, and from which the *ca. sa.* issued. That the 14 & 15 Vic., ch. 52, has altered the practice and extended the powers of the county courts, so that they can issue (among others) writs of *ca. sa.* to the sheriffs of the other counties than the one within which the court has its jurisdiction, and holds its sittings; and the argument is, that the 5th section of 10 & 11 Vic., ch. 15, does not apply when a *ca. sa.* has been issued under the new powers conferred by the act of 13 & 14 Vic.

If this argument be well founded, the consequence must be that parties taken in execution under such circumstances could not obtain the benefit of the goal limits at all. The latter act makes no provision whatever on the subject, but leaves every provision of the former untouched, whether by express words, or by necessary implication, and there would be less ground for saying that it was intended the recognizance for the limits should be filed in the office of the clerk of the county court from which the *ca. sa.* issued, and that he should give the certificate which would relieve the sheriff, than that the express words of the act should not prevail and be obeyed, when there is no difficulty in fulfilling to the letter every thing which they prescribe.

But there must be something more definite and more imperative, than this mere inference from the provisions of the 13 & 14 Vic., ch. 52, to induce the court to hold that



the legislature meant to deprive parties arrested on a *ca. sa.* issued under its provisions of the advantage of the gaol limits, and, were there no other enactment of later date bearing on the question, I should be prepared to decide that the execution defendant was in this case properly admitted to the limits, and that the certificate discharges the sheriff. But the 16 Vic., ch. 175, sec. 7 and 8, recognises and confirms the general provisions of the 5th sec. of 10 & 11 Vic., ch. 15, and while making a provision in ease and favour of debtors taken in execution, uses language of the largest signification: speaking of any party entitled to the benefit of the limits under the said act, who shall be arrested and in custody of the sheriff of the county *where the arrest is made*; and again, (sec. 8) if *any* defendant, after giving bond to the sheriff, shall deliver to the sheriff the certificate *of the proper officer of the court*, that the recognizance of bail and affidavit of justification mentioned in the 5th section of 10 & 11 Vic., have been duly filed in his office, such defendant, &c. The meaning of all this is to me quite clear: that the legislature treated the 10 & 11 Vic., as applicable to all cases of arrests on *ca sa.*, to all defendants in execution, under process issued as the law stood when 16 Vic., ch. 175, was passed.

I will only add that the directions of the 13 & 14 Vic., ch. 52, as to where the proceedings are to take place, though extending to judgment and execution, apply only to proceeding in this cause, and that the putting in and allowing bail to the limits does not in my opinion fall within that definition; moreover, the putting in and justifying bail in a district or county other than that from which theailable writ was sued out, and in which the proceedings were carried on, was established by our legislature at a comparatively early day, and a surrender to a sheriff of a different county from that whence the writ issued has a similar sanction.

On the whole, I am of opinion the verdict should be entered for the defendant.

Judgment for defendant.

## STEWART V. HAWSON.

*Pleadings—Accord and satisfaction.*

A plea in answer to the plaintiff's claim for damages sustained by a breach of an agreement, alleging that the defendant entered into a new agreement in writing with the plaintiff, containing a stipulation that the defendant would pay a certain sum, and secure the same by his endorsed note, and that the plaintiff accepted same upon certain terms, and alleging a tender of such note by defendant, and a refusal by plaintiff.

*Held* bad on demurrer, on the ground that the delivery of the note was an essential part of the consideration, and that the plaintiff was not bound by the agreement until he had received the note.

This was an action to recover damages for the breach of an agreement by the defendant to clear and fence ten acres of land at a certain rate by a specified time. The defendant admitted the breach, but pleaded that after the expiration of the time for fulfilment of said agreement in consideration that the defendant would agree to pay the plaintiff £22 10s. on 1st January then next, for the plaintiff's damages by reason of the breach of said agreement by defendant, and would agree to give his note endorsed by one William Hawson, for the said sum, within a reasonable time thereafter, and enter into an agreement with plaintiff that he would pay that sum to plaintiff, and secure the payment thereof to the plaintiff as aforesaid, he, the plaintiff would accept the said agreement and such security in full satisfaction of his damages, and allow the defendant to take for his own use the wood the defendant had cut under the said agreement in the declaration mentioned. Averment, that he, the defendant did then enter into an agreement in writing with the plaintiff containing the stipulation aforesaid, which plaintiff then accepted upon the terms, &c., and that defendant afterwards offered, &c., to plaintiff the said note, so endorsed as aforesaid, &c., which plaintiff refused.

Demurrer thereto by plaintiff on the ground that the said plea alleged accord between the plaintiff and the defendant without satisfaction made or executed.

*O'Reilly*, Q. C., for demurrer.

*Craigie* contra.

DRAPER, C. J., delivered the judgment of the court.

The plea is, that in consideration—1st, that defendant would agree to pay plaintiff £22 10s. on the 1st January then next, for plaintiff's damages by reason of the breach

of agreement. 2nd. And that defendant would agree to give his note endorsed by W. H. for that sum to plaintiff within a reasonable time—to wit, one month, securing the payment of that sum. 3rd. And that defendant *would enter into a written agreement* with plaintiff *stipulating* that he would pay that sum at the time mentioned, and would secure the payment as aforesaid. The plaintiff *would accept* the said agreement (which, the parol or the written?) and security in full satisfaction of such damages, and would allow defendant to take certain cordwood then cut and lying on plaintiff's land.

Averment: that defendant did then enter into an agreement in writing with plaintiff containing the stipulation aforesaid; and the plaintiff then accepted the same from him upon the terms aforesaid.

Further averment: that defendant afterwards, and within a reasonable time, did offer and tender *the said note*, so indorsed to plaintiff, and has always been ready and willing to give plaintiff the said note, but plaintiff has always refused to accept the same according to the terms of the agreement.

The plea at first appeared to me unsustainable; I afterwards felt same doubt about it, but have returned to my original impression.

It is settled that a new mutual agreement between parties may be made, which being binding when entered into, may be accepted as a substitution for, or satisfaction of, a preceding claim for damages arising from the breach of a preceding agreement. On such a plea the jury would have to decide whether the plaintiff agreed to accept the agreement itself or the performance of it.

As I understand the plea, the plaintiff agreed to accept an agreement to pay a liquidated sum, to be secured by a note endorsed by W. H., payable on a particular day, in satisfaction of the breach of the defendant's prior agreement, and of the damages. The plaintiff was moreover to allow (not merely to agree to allow) the defendant to take away for his own use certain cordwood.

The security by endorsed note of the liquidated sum, is, I think, a part of the consideration for plaintiff's agreement

to forego his preceding right of action, and to part with the cordwood—the agreement and the delivery of the note cannot be separated, but together form the consideration for plaintiff's agreement, and so the defendant contrues it, by averring the tender of the note. But the acceptance of the negotiable security was a part of the consideration, and it was to have been payable at a day prior to the bringing of his action. The time for payment of the £22 10s. was gone by three months before this action was brought, and yet this plea is set up as a bar to a claim for damages for an admitted breach of contract, and if good, the plaintiff has lost his right of action for that, and cannot have payment at the time fixed by the new agreement, besides having parted with his cordwood; for on the defendant's argument that must be a consequence. But my difficulty was, that the defendant avers a distinct tender by himself of the promissory note, and a continuous readiness to deliver it, and thereby to give the plaintiff a right of action against W. H., as well as against himself, but the plaintiff has refused to accept it.

If the plaintiff, however, agreed to take the defendant's agreement in writing, and the endorsed note together, as the consideration for his discharging the defendant from the breach of the first agreement, and the damages consequent thereon—and this is, in my opinion, the effect of the plea—then the plaintiff has not accepted what he agreed to accept, he has not accepted that which was to be the satisfaction. The agreement in writing alone is not enough, there must also be the endorsed note. The plaintiff, it is averred, accepted the written agreement “on the terms aforesaid;” what were they? Why that defendant should also give him the endorsed note. This, however, the plaintiff has refused, in other words, he has retracted before he became bound. Till the acceptance of the note, the matter, though inchoate, was not complete, and therefore I conclude the plea is insufficient.

Judgment for demurrer.

N. B.—See *Evans v. Powis* 1 Exch. 601; *Jones v. Sawkins*, 5 C. B. 142; *Gifford v. Whittaker*, 6 Q. B. 249; *Flockton v. Hall*, 14 Q. B. 380; *Hall v. Flockton*, in error, 16 Q. B. 1039; *Cumber v. Wane*, 1 Smith's Law Cases, 245.



## APPLEGARTH ET AL. V. GRAHAM.

The action of replevin may be brought upon a distress for school rates and notice of action is not necessary, where several devisees and executors were rated to a school rate in respect of the property of their testator, as "John A. and brothers," which entry appeared to have been made at the instance of some of the plaintiffs; but two of them only had slept on the premises occasionally, although such was not their usual place of residence, and they had received the usual notice of assessment in that form without appealing, and the same two had paid taxes on an assessment on the township roll in their individual names.

It was held: 1st. That the facts afforded sufficient evidence to shew that the plaintiffs were "inhabitants" for the purposes of the rate.

2nd. That the parties were sufficiently named on the roll to render the rate lawful.

3rd. That a demand made by the collector on the plaintiff "John A." named in the roll was sufficient to bind all the plaintiffs.

This was an action of replevin. The defendant pleaded *non cepit*. Secondly, a traverse of plaintiff's property in the goods, chattels, and personal property mentioned in the declaration. And lastly, a cognizance by defendant as bailiff of the collector of school section No. 3, in the township of Flamborough East, in the county of Wentworth, as a distress for school rates, which plaintiff refused to pay. The plaintiffs replied by taking issue on the 1st and 2nd pleas above mentioned, and pleading to the cognizance several pleas in bar, as to which no question of law is reserved for the consideration of the courts; and also by pleading thereto their second plea in bar, whereby the plaintiffs, after expressly admitting their possession and ownership of the property within such school section, at the times in said cognizance alleged, traversed that they were during that time at the said time, when, &c., inhabitants thereof; and also, by pleading their third plea in bar thereto, whereby the plaintiffs traversed that their names were mentioned in the said rate bill annexed to the warrant to destrain, as in the cognizance alleged; and also by pleading their fourth plea in bar thereto, whereby the plaintiff traversed that any demand had been made by the collector upon them, or any of them, for the amount of the rate assessed against them; and also by pleading their sixth plea in bar thereto of the same tenor and effect as their fourth plea in bar.

The cause came on to be tried before Sir *John Beverley Robinson*, C. J., at the last spring assizes at Hamil-

ton, in and for the County of Wentworth, when a verdict was found for the plaintiffs on the issues joined upon the first and second pleas of the defendant to the declaration; and the defendant upon all the issues joined upon all the pleas in bar of the plaintiffs to the said cognizance of the defendant, with leave to the plaintiffs to move to have a verdict entered for them with nominal damages, if, in the opinion of the court, the plaintiffs were entitled upon the evidence to succeed upon 2nd, 3rd, 4th, or 6th pleas in bar of the said plaintiffs to the cognizance of the defendant upon the evidence, the substance of which sufficiently appears in the judgment.

The questions for the opinion of the court are, first, whether the matters contained in any of the said 2nd, 3rd, 4th or 6th pleas in bar of the plaintiffs to the defendant, said cognizance are sufficient to entitle the plaintiffs to succeed in this action against the defendant in his said capacity of bailiff of the collector of such school section.

Secondly: supposing the matters so alleged in such pleas in bar to the cognizance, or some of them, to be held sufficient are the plaintiffs, upon the evidence aforesaid, entitled to have the verdict found for the defendant upon the issue or issues joined thereupon reversed, and to have in its stead a verdict entered for the plaintiffs thereon? If the court shall be of opinion in the affirmative of both these questions, then the verdict is to be entered for the plaintiffs upon the issue or issues joined upon such of the said 2nd, 3rd, 4th, and 6th pleas in bar to the said cognizance as shall be adjudged in favour of the plaintiffs, with one shilling damages; and for the defendant upon the issues joined upon the other pleas in bar of the plaintiff to the said cognizance; but if the court shall be of a contrary opinion on either of such questions, then the verdict is to stand and be entered for the defendant upon all the issues joined upon all the pleas in bar of the plaintiffs to the defendant's cognizance; and for the plaintiff upon the first and second pleas of the defendant to the declaration.

*Eccles*, Q. C., for plaintiff.

*Martin*, for defendants, cited *Dews v. Riley*, 11 C. B. 434; *Mitchell v. Greenwood*, 3 U. C. C. P. 465.

DRAPER, C. J., delivered the judgment of the court.

We are of opinion that the objection taken at the trial for want of notice of action was properly overruled. The case of Folger et al. v. Minton (10 U. C. Q. B., 423), is in point.

We are also of opinion that the action of replevin may be brought in such a case as the present, in the same way that an action of trespass would lie. The mere fact that the defendant took the property, claiming to act under an authority to collect school rates, affording in itself no answer to the action.

The defendant has (very unnecessarily) pleaded *non cepit*, which is found against him. He has also denied the plaintiff's property in the goods, a plea which, under what appears, is equally uncalled for. His defence rests upon the cognizance, and upon that only. In this he sets forth that he is the bailiff of the collector of the school section No. 3, in the township of Flamborough East, and justifies taking the goods as a distress for school rates, for which defendants were rated on the collector's roll. The plaintiffs pleaded several pleas to this cognizance. On four of these, questions arise for the consideration of the court. 1st Traversing that at the time, when, &c., and during the time alleged in the cognizance they were inhabitants of the school section No. 3. 2nd. Denying that their names were mentioned in the rate bill annexed to the warrant to destrain. 3rd. Denying any demand made by the collector for the amount of the rate prior to the distress ; and 4th, to the same effect.

As to the demand, the evidence is quite sufficient to support the finding for the defendant.

It appeared that the land and property in respect of which the plaintiffs are rated, are all within the school section No. 3, and belonged to the late John Applegarth, who by his last will appointed the plaintiffs his executors. That two of them occasionally slept on the premises during the period when the rates accrued, in the course of business working a mill which was erected there. One was in that way residing there when the distress was made. The rate was entered on the bill in the names of "John Applegarth and brothers," this entry was made by the direction of several of the defendants

on one of the school trustees calling upon them in reference to the school rates for this property, at their usual place of residence, which was not within the limits of school section No. 3. After this the usual printed notice of the assessment was left with the plaintiff, John Applegarth. No objection appears to have been raised on this account prior to the distress. The township assessments were entered on the township roll, in the names of the plaintiffs, John, William, and Clarkson only, though relating to some property in which the whole of the plaintiffs were interested in their representative character, and the taxes were paid without difficulty.

Looking strictly at the plea, it cannot be said that the evidence shews that all the plaintiffs were individually inhabitants of the school section No. 3, or that the names of all the plaintiffs were on the rate bill. Enough, however, appears to shew that the plaintiff's interest in the property replevied is in their representative character: that the charge for school rate is upon property which belonged to their testator, and that the application was made by the school trustee to some of them as representing the estate, and that the entry made in the name of "John Applegarth and brothers," was so made by request of several of the plaintiffs, in respect to this property and to this school rate. I think this afforded evidence to go to the jury sufficient to warrant a finding for the defendants on these issues.

That the merits of the case are with the defendant is very clear. The school rate was lawful—was due in respect of property represented by the defendants—and the distress for it was made upon property belonging to them as representatives of their father's estate. They were applied to before the names were put upon the rate bill, and several of them assented to the names which were inserted; and they had a proper notice of the amount they were called upon to pay before the distress was made. Under the circumstances appearing, I am of opinion that while the rolls remain with the rate charged unaltered and unappealed from in manner provided by law, it should be treated by us as determining in favour of the collector acting under a proper warrant, that



the parties named are the proper parties to be named upon the roll : that the property in respect of which the rate is charged, is properly charged in their names, and that the rate is lawful.

Then when we find that the goods seized are the property of the same estate that the property assessed or charged belongs to : that the names inserted on the roll were so inserted by some of the plaintiffs, called upon to act in their representative character, and capable in law of binding the estate they represented to the extent necessary. I think their own acts amount to an admission that, for the purposes of the rate, they were resident in the school section, and that the name inserted was a sufficient designation of them. I think, without going into other reasons, that the defendant is entitled to our judgment.

#### Judgment for defendant.

The Chief Justice referred to *Andrews v. Marris*, 1 Q. B. 3 ; *Ely v. Moule*, 20 L. J. N. S. Exch. 29 ; *Clark v. Woods*, 2 Exch. 395 : *Calder v. Halket*, 3 Moo. P. C. cases 28 ; *Whitelegg v. Richards*, 2 B. & C. 45 ; *Buron v. Denman*, 2 Exch. 167 ; *Cooper v. Harding*, 7 Q. B. 928 ; *Tunno v. Morris*, 2 C. M. & R. 298.

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### VIVIAN V. CAMPBELL.

#### *Boundary Lines.*

On an ejectment to recover part of a lot on the 1st concession of Thurlow, it appeared on the Quebec map that the road in front of the 1st concession was marked out from one end of the township to the other, but no original monument could be found further east than the south-east angle of lot 13. The defendant, in 1835, had received instructions for a survey of an Indian reserve of lots 28, 29, 30 & 31, on the broken front on the Bay of Quinte, and to run the lines thereof butting their rear on the 1st concession, and this was the 1st survey on the ground. In 1841 the boundary line commissioners made an award as to the broken front, and ordered stone boundaries to be entered where the defendant had planted posts "on the rear of the Indian reserves, and in front of lots 28, 29, 30, and 31, in the 1st concession."

It was held on the evidence that the plaintiff could not draw a side line between lots 27 and 28, commencing at the post planted in *front* of the broken front in preference to one deduced from the monuments on the road in front of the first concession.

EJECTMENT for the south part of the east half of lot No. 27, 1st concession of Thurlow, containing 50 acres. Writ issued

10th March, 1855. The defendant appeared as landlord, and defended for part of lot 28, 1st concession of Thurlow, as reckoned in the western boundary, and part of the broken front, in front thereof, commencing at a stone monument planted by the boundary commissioners at the south-west angle of No. 28, in the 1st concession of Thurlow; then northerly, following the course of the western town line of Thurlow to the centre of the said concession; then easterly, parallel with the rear line of said concession 1 chain, 37 links; then southerly, parallel with the first mentioned line to the water edge of the Bay of Quinte; then along the shore to a line produced on the course of the town line from the place of beginning, claimed by defendant as part of No. 28, 1st concession, and of the broken front, in front thereof, and by the plaintiff as part of No. 27, 1st concession, of Thurlow. At the trial the plaintiff proved a paper title to the south-east quarter of No. 27, 1st concession, and then went into evidence as to the boundaries. It appeared that the lots numbered from the west to the east side of the township of Thurlow. Original monuments on the first concession line were found and clearly established at intervals, the last being at the south-east angle of number eighteen. The Quebec map of the township showed the road in front of the front concession as marked out from one end of the township to the other; but no original post or monument has been found further east than at the south-east angle of lot No. 18. Still the government seem to have intended that the first concession should be of a uniform depth, as represented on the Quebec plan; and on the 22nd July, 1835, the then surveyor-general of Upper Canada directed the defendant, a deputy provincial surveyor, to proceed to a survey of certain lots reserved for the Indians in Thurlow, "being lots Nos. 28, 29, 30, and 31 on the Bay of Quinte," and adding, "You will run the lines of the four lots in question butting their rear on the first concession of Thurlow."

The next original monument which is proved stands on the edge of the marsh, on the south-easterly angle of lot No. 21, apparently thirty-five chains or more south of the road, in front of the first concession, and posts are found ranging

with this, going easterly to the line between lots 23 & 24. The next and last original monument that can be established stands on the side road between lots 25 & 26, and is a little further south than the last posts referred to. The first survey actually made on the ground of the first concession line in front of lots Nos. 28, 29, 30, & 31, was that made by the defendant in obedience to the instructions above set forth, and he planted posts in rear of the Indian reserve on the road in front of the first concession, designating the boundaries of those lots, or of the lots similarly numbered in the broken front, which constituted the Indian reserve. In 1841, divers questions arising as to the front angles of lots in the first concession, and the broken front of the township of Thurlow, they were submitted to the boundary-line commissioners, who awarded among other things as follows: "That the distance from the easterly limit of lot No. 23, to the old post on the easterly limit of lot number 25, shall be equally divided into two lots, and then from the westerly limit of lot number 26 to the original eastern boundary line of the said township, *in the broken front aforesaid*, shall be equally divided in six lots;" and further: "We do order, adjudge, and decree that stone boundaries shall be erected where Alexander Campbell, deputy provincial surveyor has planted posts under the authority of the government, on the rear of the Indian reserve, and in front of lots 28, 29, 30, & 31, in the first concession aforesaid, which monuments ought, and so far as the decision of this board is concerned, shall point out the true and correct front angles of each of the aforesaid lots;" and lastly: "We do order, adjudge, and decree that stone monuments be placed at the points or places of all the original posts hereinbefore mentioned, and also at the limits of all the intermediate lots from lot No. 5, to lot No. 31, inclusive, and that John Emerson, deputy provincial surveyor, be instructed to plant them accordingly."

On this evidence the plaintiff contended that the said line between lots Nos. 27 & 28 in the first concession of Thurlow, should be ascertained by commencing at the post planted in front of the broken front, which is about 40 chains or more south of the line run by Campbell, as marking the rear of the

broken front, and consequently the front of the first concession. If right on this point he would be entitled to recover. The Chief Justice of Upper Canada, before whom this cause was tried, directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for himself on any point arising upon the facts proved.

*Bell*, of Belleville, in Michaelmas Term obtained a rule *nisi* in pursuance of the leave reserved.

In Hilary Term, *Walbridge* shewed cause.

*O'Hare* supported plaintiff's rule. The point on which it was rested was that Campbell had no legal authority conferred on him to plant posts to govern the front angles of the lots in the first concession, and from thence it was endeavoured to be inferred that the place of starting adopted by the plaintiff's surveyor was correct.

DRAPER, C. J., delivered the judgment of the court.

Neither the original instructions nor the field notes of the first survey are in evidence. But from the evidence that was offered, I think the correct conclusion is, that the first concession is bounded in front by a road running from west to east in a straight line, and that it was intended to be of a uniform depth. But this conclusion is fatal to the plaintiff succeeding on this rule; for unless he has ascertained the correct place or point at which to commence running this side line, then, although it may be run in a right course, truly parallel to the western boundary of the township, we cannot tell whether it is in the right place or not, and therefore he fails to establish his right to recover. There is nothing in the statutes which warrants the taking a post in front of lots in a broken front concession for the purpose of determining the front angles of lots in the next adjoining concession in rear. The front of the first concession was either run through at the original survey, or it was not. There seems no doubt that it was run as far as the south-east angle of No. 18, possibly to the south-east angle of No. 21, but not eastward of that, as far as the evidence shews; it is not even proved that any monument was originally planted at the east end of the concession. But if it was not



run, there is no legal authority for governing lots on it by posts in the broken front, and if it was run, the statutes point out a totally different method of determining the width of lots where the original monuments have been lost. Either way the plaintiff falls—whether Campbell's posts govern the front angles of Nos. 28, 29, 30, & 31, or not. As to this point, much might be urged on the defendant's side, if the first concession line in that part had never been previously surveyed; for in order to fulfil his instructions it was necessary for him to ascertain to that extent, where the first concession really did extend to, and the effect of the award of the boundry-line commissioners, determining the posts planted by him to govern the front angles of the lots in the first concession may be found to determine the question finally: but our decision is not grounded upon this consideration. We are of opinion for the other reasons given that the rule must be discharged.

*Per Cur.*—Rule discharged.

# CAMPBELL V. BUCHANAN ET AL.

## *Landlord and tenant—Out-going tenant.*

In a three years lease the words "also to allow the said W. & J. N. (tenants) the right of leaving in fall crop the same quantity of land as is now in fall crop when they get possession," coupled with the fact that there was then a fall crop on part of the land which had been sown by the preceding tenant, and which he was entitled to reap, were—

*Held* to confer on the tenants the right to sow a crop during the tenancy which they might reap afterwards, and that they had a right to dispose of such crop to third persons.

TRESPASS, *quare clausum fregit* to the south half of lot No. 17, eighth concession of the township of Beverley, and mowing and cutting down the wheat, rye, and corn of the plaintiff, then growing in plaintiff's close, *an asportavit* thereof, of the value of £100, and converted it to their own use.

2nd count—*De bonis asportatis* of wheat and rye of plaintiff's. Damages £200.

*Pleas*—By all the defendants. 1st. Not guilty. 2nd. Close not the close of plaintiff. 3rd. To second count, not possessed.

The case was taken down to trial before *McLean*, J., at the fall assizes of 1856, held at Hamilton, when a verdict was rendered for plaintiff for £69 19s. 1d. It appeared that defendant Dougald Buchanan, on the 19th of March, 1852, leased the *locus in quo* to William and John Nevills for three years from that date at £24 13s. 9d. per annum. The instrument in writing, under seal, signed by the parties was very inartificially drawn; the lessor thereby covenants, “that I will split or cause to be split, one thousand good and sufficient rails, to be left at a convenient place of the clearing, making in all three thousand in the three years, also to allow the said William and John Nevills the right of leaving in fall crop the same quantity of land as is now in fall crop, when they get possession; also the good right of getting firewood off the north-west corner of lot No. 16; and the aforesaid William and John Nevills, doth covenant with the said Dougald Buchanan, to gather all the lose stones into piles in the field, also to keep the fence of the orchard in good repair after it is first built, by the said Dougald Buchanan, and to leave twenty acres seeded down with clover and timothy seed, and pay the land tax during the lease.”

When the Nevills went into possession there was a fall crop put in by Dickson, a former tenant, and taken away by him when ripe; the last fall the Nevills were in possession they put in seven or eight acres of wheat and some rye. They left the place at the expiration of the term. About the middle of January, 1855, the Nevills sold their interest in the crop to plaintiff for £23 15s., which he credited them on account and gave a receipt for that sum, but he did not get any instrument in writing assigning the crop to him. On the 19th of July, 1856, Nevills executed a conveyance to plaintiff of the wheat and rye, dated that day, consideration £23. In the same instrument it is recited, that the bargain of the above wheat and rye was made by the parties in the month of January last, and possession thereof given to plaintiff, and at his request they then executed unto him that deed of confirmation thereof; this transfer was not filed in the county court office.

On the 26th of July executions against the goods and chattles of the Nevills were placed in the bailiff's hands in favour of the defendants Holcomb and Buchanan, and on the 26th of August another execution against their goods in favour of John Kirkpatrick, on which execution the wheat was subsequently cut and sold. Nevills paid Buchanan £20 on account of the rent due in February, 1855, and afterwards offered to pay the balance of the rent; but he would not accept it unless they paid a judgment he had obtained against them for not piling the stone according to the lease; one of the Nevills, before leaving the place, told Buchanan he had sold the wheat and rye to plaintiff, and that he had nothing more to do with it; Buchanan did not then dispute his right to sell.

A witness who lived adjoining the field, stated that plaintiff desired him to take charge of it and see that no cattle got in before the snow went off; he repaired the division fence in April, and kept a look out to prevent its being trespassed on. One Duncan Buchanan held the premises under lease after the Nevills. He entered about March; the wheat was about a mile from plaintiff's place.

Another witness stated, that after the place had been rented to Dr. Buchanan, a colt got into the wheat in the latter part of April or beginning of May, he spoke to Dougald Buchanan about it, and asked why he did not take care of his wheat, he said it was Campbell's wheat, and he might look after it.

There was evidence to go to the jury that all the defendants were concerned in the cutting and sale of the wheat. Plaintiff's bill of sale was not registered in the office of the clerk of the county court.

The defendants' counsel moved for a nonsuit on the following grounds:

Plaintiff had not shewn any good title in himself or in the Nevills to the wheat in question: that the lease does not in terms reserve the right to the lessees to enter and take the wheat as their property: and that the land having been given up to Dougald Buchanan, the landlord, all that was in the ground passed with it.

2nd. That the instrument produced recognising the previous sale of the wheat is invalid, not having been filed according to law, and no change of possession having been proved.

3rd. That there is no written assignment of the wheat, the instrument produced being a mere acknowledgement of a previous sale. The learned judge overruled these objections; the jury having found a verdict for the plaintiff as above mentioned.

In Michaelmas Term last *O'Reilly*, Q. C., obtained a rule to set aside the verdict, the same being contrary to law and evidence, and for misdirection of the learned judge who tried the cause.

In Hilary Term *McMichael* shewed cause, and contended that the right of leaving in a fall crop mentioned in the lease, was in fact reserving the right to Nevills to take away the fall crop they might put in: that the evidence shews that the former tenant had left in a crop which he took away; and that the words of the lease, applied to the state of things which existed at the time the lease was drawn, as shewn by the evidence, would well warrant this conclusion: that, at all events defendant, Buchanan, having seized the grain under a *fi. fa.* against the Nevills, defendants were estopped from now saying that the wheat was Buchanan's or his tenant, Duncan Buchanan's: that the assignment contains an actual transfer of the Nevills' right in the wheat which would operate from its date, the 19th of July, at all events, and the recital and confirmation of the previous sale: that there was an actual change of possession from January, plaintiff having employed a person to look after it, who kept up the fences, &c. He referred to *Gibbs v. Crawford et al.*, 8 U. C. Q. B. 155; *Fraser v. Lazier*, 9 U. C. Q. B., 679.

*O'Reilly*, Q. C., contra, contended that as to Buchanan seizing the goods, that could work no estoppel even if the case of *Gibbs v. Crawford et al.*, were an unquestioned authority; that a party who seizes his own goods on an execution by himself against a third party, is estopped from shewing that these goods were his own and not the goods of a third party, inasmuch as this is a joint action



against all the defendants, who cannot be estopped by Buchanan's previous acts, before they could be said to be acting together.' Besides *Lynn v. Wakefield et al*, in this court, is an express authority that there is no such estoppel where the goods are seized under a *fi. fa.*

He further contended that the right to growing crops was an interest in land which could only pass by an instrument in writing under seal, and no mere confirmation of a previous verbal sale was sufficient : that whatever interest the Nevills had, could at best only pass from the 19th of July, and there was no evidence plaintiff was in possession then, or after that, and as the assignment was not registered nothing passed by it.

Further, that the words of the lease whereby Buchanan covenants, among other things, to allow the Nevills the right of leaving in fall crop the same quantity of land as was in fall crop when they got possession, does not grant to them any right in his land beyond the time expressed in the lease.

If it operated for the benefit of the Nevills at all, it could only operate by extending the term as to the land which was in fall crop to the time necessary to harvest the crop, or as a permission to come in and harvest it when ripe. He contended the words were not broad enough to extend the term. The lease merely granted the privilege of leaving in a fall crop, not the right to take it away, and if it was a mere permission to come in and harvest the crop when ripe and take it away, that was a personal right, which could not be assigned, and if assigned, did not pass the property in the wheat, which would, in their view, be the property of the landlord until cut. He referred to *Griffiths v. Puleston*, 13 M. & W. 358; *Hayling v. O'Key*, 8 Ex. 531; *Smith v. Surman*, 9 B. & C. 561. To which may be added *Mayfield v. Wadsley*, 3 B. & C. 357.

DRAPER, C. J., delivered the judgment of the court.

The first and most material question which presents itself is, what is the proper and legal construction of the covenant of the defendant, Dougald Buchanan, in his lease to the two Nevills, dated the 19th of March, 1852. The words are, "also to allow the said William and John Nevills the right

of leaving in fall crop the same quantity of land as is now in fall crop when they get possession."

It appeared that when the Nevills got possession there was a fall crop on part of the land demised to them, which had been sown by the preceding tenant, and which he was entitled to reap; I think we are at liberty to take this into consideration as one of the "surrounding circumstances," explanatory of, or throwing light upon, the intention and meaning of the contracting parties. Then looking at the covenant, we are bound, if we can do so without violating any settled rule, so to construe its language as to give it some effect and operation. We must hold that the landlord intended to give to the Nevills some benefit and advantage which, but for the introduction of this clause, they would not have been entitled to, and we see a plainly expressed consideration for his agreement in the limitation that they might leave in fall crop the same quantity of land as "*is now* in fall crop when they get possession." At the trial, also, the fact was proved, and no objection appears to have been taken to the admissibility of the evidence, that the preceding tenant had a fall crop in the ground, which was taken away by him in harvest time, next after the Nevills had entered under their lease.

It is obvious, that pending the term, the Nevills had an unqualified right to sow whatever they pleased; they required no special permission or covenant from their landlord to confer this right on them. It would be trifling with justice, to hold that the words, "the right of *leaving* in fall crop," to have been used with the intention that the Nevills should leave behind them for the use of the landlord, or of any body but themselves, any crop they might sow in the fall preceding the expiration of their term. It is to my mind too clear to permit hesitation, in holding, that it was obviously intended as an advantage—a substantial benefit meant to be conferred upon them. Their landlord, as well as the other defendants, so understood it; the former having declared to a witness that he had no interest in the crops, and all the defendants having treated the grain as belonging to the Nevills, or they would not have seized and sold it under executions against them. I think the proper construction of the landlord's covenant is, that it conferred on the Nevills the right of

sowing a crop during their tenancy which they might reap afterwards.

There can be no doubt either that they had a disposing power over these crops, if the construction I put upon the covenant is the true one. There was also a sufficient evidence to go to the jury of a delivery and an actual and continued change of possession attending and following the parol sale, if the right and interest of the Nevills could pass to the plaintiff by parol; so that in this respect the verdict might be sustained, treating them as mere chattels; and if an interest in the land passed to the Nevills by their landlord's covenant, then such interest remained in them until their deed to the plaintiff, which in that case would not fall within the provisions of the 13th & 14th Vic., ch. 62.

Upon these grounds I am of opinion the rule should be discharged.

Rule discharged.

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### BROWN V. MALPUS.

#### *Grounds for a new trial—Pleading—New assignment.*

The mere fact that the evidence might have warranted the jury in finding a verdict contrary to that rendered, will not be sufficient ground for setting such verdict aside, even where the court are inclined to think the evidence preponderated in favour of the unsuccessful party, but were not clearly convinced there was a denial of justice.

Where in an action brought on an agreement to run the plaintiff's saw-mill, the declaration suggested breaches "before, and during, and after" a particular day, and the defendant pleaded a general averment of his readiness to perform the agreement, and that the plaintiff prevented him, and after the particular day referred to evicted him from the mill, though the defendant was ready to perform his part, and the plaintiff new assigned for breaches, previous to the alleged eviction.

*Held*, on demurrer, to such new assignment, and a rejoinder therein by plaintiff objecting to the plea, that it only answered part of the count in the declaration to which it was pleaded. 1st. That the objection to the plea came too late. 2nd. That the plea was good, the latter words of the plea not restricting the prior averment that the defendant was ready at all times.

*Quære*, as to the effect of the 88th section of the Common Law Procedure Act, when a separate new assignment has been pleaded to several pleas.

This action was brought on an agreement under seal, dated 6th February, 1856, and declared upon, whereby defendant agreed, so long as plaintiff sufficiently supplied him with logs, and if defendant could hire sufficient help, that he would run both by day and night until 1st November,

1856, plaintiff's saw mill, situate, on, &c., and manufacture for plaintiff, out of such logs, good and merchantable lumber in such manner as plaintiff or his agent should direct; also, on the said 1st November, or whenever defendant should quit the mill, to leave it and the machinery thereof, and the buildings, &c., appurtenant thereto, and the other articles mentioned in the schedule attached to the agreement, in good repair, with certain exceptions, subject to which defendant agreed that while he retained possession he would do all necessary repairs, and make good all breakages; and that if defendant should one month before the 1st November, 1856, notify plaintiff that he (defendant) intended to run the mill for one year from said 1st November, then the agreement should continue in force until the expiration of such year. Averment, that plaintiff had performed his part; that defendant could have procured sufficient help, and could have manufactured out of the logs, and supplied merchantable lumber as directed. Breaches: 1. That though defendant one month before 1st November, 1856, did notify that he intended to continue to run the mill for one year from, &c., both *before*, and *during*, and *after* that day made default in running the mill as above stipulated. 2. And before and during, and after that day made default in properly manufacturing out of such logs good and merchantable lumber as directed. 3. And before, after, and during that day, made default in repairing. 4. And though after said 1st November, and before the commencement of this suit, defendant has left the mill, he has made default in leaving the mill buildings, machinery, and appurtenances in the repair stipulated. 2nd count, and also that defendant converted to his own use plaintiff's other goods—to wit, boards and sawed lumber.

Defendant pleads to first count *non est factum*.

Second, to first count: Non-performance by plaintiff of conditions precedent, that plaintiff should deliver all saw logs to be cut by the defendant on the roll way of the mill, and should keep men to measure the lumber manufactured by defendant, and should direct and superintend the piling of the lumber, and should direct defendant as to the manner of cutting the lumber. And should pay certain debts of



defendant, neither of which things did plaintiff observe, perform, or do.

3rd, to first count: That defendant did not notify plaintiff that he intended to continue to run the mill for a year from 1st November.

4th, to first count: That he could not obtain sufficient help.

5th, to first count: A statement in detail of performance by defendant of each condition.

6th, to first count: Averment of defendant's readiness to perform, yet plaintiffs, wrongfully and contrary to the terms of the agreement, prevented him from so doing. And after 1st November, 1856, and after this defendant had notified plaintiff of his intention to continue to run the mill, plaintiff wrongfully evicted defendant, and kept him evicted, though defendant was willing to perform the agreement.

7th, to second count: Not guilty.

8th, to second count: Goods not plaintiff's.

The plaintiff takes issue on all the pleas; and also replies to the 6th, that he sues not only for the breaches, and causes, and rights of action in that plea, but also for the other breaches and causes and rights of action in the first count mentioned, previous to, and unaffected by the alleged hindrance and prevention by plaintiff's eviction of defendant.

Plaintiff also replies to the 4th plea, that he sues not only for the breaches, causes, and rights of action in that plea mentioned, but also for the other breaches, &c., in that count mentioned, not covered by and coming within any period when, as defendant alleges, he could not obtain sufficient help.

Plaintiff replies in a similar manner to the 2nd plea; and to the third, that he sues not only, &c., but for those breaches which occurred previously to the period of a year from 1st November, 1856.

Defendant rejoins, by demurring to the new assignment to the 6th plea, on the ground that the new assignment is not supported by the declaration, and that no new matter is in fact assigned, and the plaintiff joins in demurrer, objecting to the 6th plea because it is pleaded in the commencement as a bar to the first count, but answers only part of it; that it confesses without avoiding the whole of the first count.

Defendant also rejoins to new assignment to 4th plea, that at such times as he could obtain sufficient help he did well and truly fulfil the agreement on his part.

And to new assignment to 2nd plea, that he did during all the time mentioned in the declaration repair, and keep in repair, &c.

And to new assignment to 3rd plea, defendant admits that plaintiff sues for breaches which occurred previously to 1st November, 1856, on which issue is joined.

The cause was tried at Simcoe in May, last, before *Burns, J.* The agreement was proved, and it appeared defendant was to be paid a fixed price per thousand for the lumber he cut. Evidence was given that repairs, which, however, the plaintiff had to pay for, were not done as quickly as they might have been, and that the mill was consequently stopped longer than was strictly necessary. Also, that defendant did not run the mill by night as well as by day. Also, that directions were given that defendant should "edge and rip" the lumber sawed, or part of it, which would have increased its value. Some evidence was also given to support the second count. On the defence, some evidence was given to rebut the charge of delay in repairs not very clear, and also to meet the second count. And defendant proved efforts on different occasions to hire help, in which he was unsuccessful. And as to the quality of the lumber sawed, he endeavoured to meet it by proving that the lumber he made was as good as was generally made. No proof was offered of any breach by the plaintiff of conditions precedent.

The learned judge left the case to the jury on the evidence, and they found for the defendant.

On the 1st June, 1857, *Martin* obtained a rule *nisi*, for a new trial, on the ground that the verdict was contrary to law and evidence, and perverse and contrary to the learned judge's charge.

During this, Trinity Term, *Eccles, Q.C.*, shewed cause.

*DRAPER, C. J.*, delivered the judgment of the court.

The plaintiff's claim to a new trial is rested only on the breach alleged that the defendant did not saw the lumber

according to the directions ; and this is a question on the evidence for the jury. It was properly left to them, and one ground stated in the rule is, that they have gone against the charge. As to the verdict being perverse, the explanation given in several cases shews it applies to matters of law rather than of fact, and no question of law arose in which the jury appeared to have disregarded the direction. On examining the evidence, I certainly think it would have warranted a verdict for the plaintiff for some damages, and that the evidence of plaintiff preponderates. But a new trial could only be properly granted either on payment of costs, or leaving the costs to abide the event (C.L.P. Act, 1856, sec. 163), and we should, I think, see clearly that in reason and justice, and on a view of all the circumstances, the verdict in fact is a plain denial of justice, before we set it aside. I cannot take it upon myself to say that the verdict is of such a character, that we ought to relieve the plaintiff even on payment of costs, and therefore I think the rule should be discharged.

The demurrer was also argued on another day in the same term by *Martin* for the plaintiff, and *Eccles*, Q. C., for the defendant.

After our refusal to grant a new trial, the decision of the demurrer involves nothing more to the parties than the question of the costs of the issue in law. The plaintiff objects that the plea is bad, for this is not an answer to the whole of the first count, though it is pleaded in bar of the whole. As to the objection, it would seem to come too late, even before special demurrers were abolished, and if so, is *a fortiori* not tenable now. In *Harvey v. Grabham* (5 A. & E. 61), a similar point arose, and Lord *Denman* (page 73) said " which might make it liable to a special demurrer." See however, *Chappell v. Davidson* (2 Jur. N.S. 544.) It may be questioned on another ground, whether the plaintiff can, after taking issue and now assigning to this plea, be afterwards permitted to raise an objection by way of demurrer to it. We must assume he had a judge's order under which he obtained leave to reply in this way, and he had then an opportunity of making his election whether to object to the plea as bad in substance, or to rely exclusively on matters of fact. Independ-

dently of this, I think the plea good. The first three breaches are laid as committed *before*, and *during*, and *after* the 1st November, 1856, the last is confined to what happened after that day. The plea is, that *at all times* after the making of the agreement the defendant was ready to perform it, but that plaintiff wrongfully hindered and prevented him from so doing; and that after 1st November, 1856, and after defendant had given notice of his intention to continue, the plaintiff evicted him. The substance of this plea is, that defendant confesses the breaches charged in the declaration, but asserts such breaches arose from, and were caused by, the plaintiff's wrongful acts. The plea covers all the time before, during, and after the 1st November, 1856, until the alleged final eviction. The plaintiff's objection is, that the plea does not meet all that the declaration charges, and to sustain this, he asserts that the general words of the former part of the plea, are limited by the latter, which states an eviction, and that the effect of the plea is to set up the eviction as an answer to the whole declaration, which it very clearly is not. But I do not think the plea ought to receive that restricted construction, but that it applies to every breach the defendant has committed, and that proof of any breach which was not caused by the plaintiff's hindrance would, so far as this plea is concerned, entitle him to recover, for the plea offers an answer not to some particular breach of contract, but to every breach committed within the period stated in the declaration. But this conclusion seems to me to decide against the new assignment, the object of which is to shew that the plea (assuming it to be a good answer) does not meet the declaration, for the declaration is general in the assignment of breaches. The plea answers every breach which the plaintiff can prove within the issues stated in the declaration, and the new assignment leaves the matter as much at large as it was before, unless the plaintiff was right in narrowing the effect of this plea to breaches resulting from the eviction, which I think he was not.

No question has been raised as to the effect of the 88th sec. of the C.L.P. Act, 1856, limiting a plaintiff to one new assignment to any number of pleas. The demurrer book



does not show that there is a separate new assignment to several pleas, but it appears to us from the *nisi prius* record which we have before us on the motion for a new trial.

We cannot help observing, that from some cause or other, the pleadings on that record, instead of being limited, appear to be increased, by the effect of the C.L.P. Act. Not only are there two-fold replications by taking issue on the pleas and new assigning also, but there are as many pleas as there probably would have been, before the law in effect prohibited several pleas, without the sanction of the court or a judge, and some are so palpably inconsistent, and one at least so untrue, (*non est factum*,) from what appeared at the trial, that it is difficult to imagine the defendant could have made an affidavit such as the 130th section of the C. L. P. Act, 1856, requires.

Judgment for defendant on demurrer,  
and rule for new trial discharged.

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## BOWIE V. THE BUFFALO, BRANTFORD AND GODERICH RAIL- WAY COMPANY.\*

*Railway Company—Common Carriers—their Liability as such.*

The plaintiff delivered to defendants, as common carriers, foreign goods in bond at Buffalo to be carried to Brantford, valued at £69 3s. A receipt was given (26th April, 1854) for (amongst other things) a box at Buffalo for *way station*. The contract as alleged in the declaration being to carry the goods from Buffalo to Brantford, and there to deposit and keep them for plaintiff, for reward, &c.

Frequently before the defendant's freight station was burnt at Brantford (the 8th or 9th of May, 1854), and afterwards, plaintiff applied for the goods, when the answer was "not arrived." On the 9th of May the answer was "burnt up." It was admitted the goods arrived on the 5th, or 6th of May, and were stored in a bonded warehouse in the defendants' control, and were burnt up on the 8th or 9th, and that no notice of arrival was sent to the consignee.

*Held*, that under the contract as stated in the declaration and proved, the defendant's liability as common carriers had ceased, and that of warehousemen commenced, and that whatever their liability was as warehousemen, that of common carriers having ceased, they were not liable under the contract as alleged in the declaration, and not bound to give notice.

CASE against defendants as carriers for hire for loss of goods delivered to defendants as common carriers, who received the same as such, to be carried for plaintiff from the

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\*The judgment in this case was delivered in Hilary Term 18 Vic.: the decision being important and frequently referred to, it is therefore now published.

city of Buffalo to the town of Brantford, *and there to be deposited and kept for plaintiff*, for reward, &c. Yet the defendants neglected their duty and did not use due care in carrying the said goods or *in depositing and keeping* them at Brantford, whereby said goods were wholly lost to plaintiff.

Second count—Trover.

Pleas 1st—Not guilty per statute.

2nd—That defendants did not as such common carriers, receive from plaintiff the said goods to be (after the arrival thereof at Brantford as alleged in the declaration) deposited and kept for the plaintiff for reward, &c., *modo et forma*, to the country and issue. It was admitted the packages mentioned in a receipt were received to be carried from Buffalo to Brantford, value, £69 3s.

The receipt, 26th of April, 1854, is for (amongst other things) a box in plaintiff's name received at Buffalo for *way station*.

A way bill of May the 8th, from Buffalo to Brantford, did not mention such box. Three weeks before the defendants' depot at Brantford was burnt, and frequently afterwards, plaintiff or servant applied for the goods and was told, "not arrived." The last time was on the Monday preceding the fire; after the fire on the 9th of May (*quære* 8th), the answer was, "burnt up."

They were foreign goods in bond, and the custom house officers had a bonded warehouse at the depot in Brantford, and plaintiff was to pay the duties. It seemed admitted the goods had arrived three days before the fire, and were in such bonded warehouse, of which defendants' agent kept a duplicate key; he said the box had been deposited therein on the Friday or Saturday before the fire, which was on a Monday (8th May.)

It was said to be the duty of defendants' freight agent to give notice of arrival to consignee.

That goods usually come from Buffalo to Brantford in twenty-four hours.

No notice of the arrival was given to plaintiff. That the box arrived on the 5th or 6th of May, without a manifest in customs warehouse car under lock and key, whence it was

transferred to the bonded warehouse in defendant's engine house at the depot in Brantford station, which was burnt on the 8th or 9th of May.

The Chief Justice ruled in plaintiff's favour in the absence of any notice of arrival after a reasonable time, and the jury found for the plaintiff, £69 3s.

*Rule nisi* to set aside verdict as against law and evidence, and for misdirection.

Mr. Galt shewed cause, and contended there was evidence of negligence in several respects :

1. In the first place in not writing the box of goods upon the way bill.

2. In the want of satisfactory proof that the goods were carried to Brantford or deposited in the warehouse at all.

3. In not giving prompt notice of their arrival, if they had arrived ; and that until their arrival was duly notified to the plaintiff, who had repeatedly called and enquired after the goods, and so had used all the diligence in his power, the defendants continued liable as common carriers.—Story on Bailments, 4 Ed. S. 509 ; Bourne v. Gatliff, 11 Clk. & F. 45.

*Read*, in reply, contended that the contract or undertaking as laid in the declaration was not proved, namely, to carry to *Brantford* for the plaintiff, and there to deposit and keep for him, there being no proof of their obligation to keep for him after their arrival, that is, as carriers. That *way station* in the receipt may be admitted to mean *Brantford* ; but if so, it meant nothing more, and did not mention *depositing or keeping* : he relied on 11 C. & F. 45, as shewing that the bill of lading or contract differed from the declaration, and did not support it. That the jury should have been told that the defendants' duty as carriers ceased upon the delivery of the goods in the warehouse without notice, having been placed there under a custom house key, in compliance with their undertaking, and for the plaintiff's convenience, not their own.—Bourne v. Gatcliffe, 3 M. & G. 679, 682, 3. That much depended on the custom of the trade which defendants had followed—1 vol. American Railway Cases, 407, Thomas v. The Boston and Providence Railway

Corporation. That omitting to enter in the way bill in evidence was not evidence of negligence, nor was delay in carrying; and if it was, the action is not for unreasonable delay in carrying, but for the absolute loss of the goods. That the goods were not unreasonably delayed in fact; nor were they unreasonably detained without notice. That they were when lost in the defendants' hands as warehousemen—not as carriers; and that the plaintiff was not entitled to notice to come and receive or to take care of his goods, but bound to enquire after them at the custom house, under whose officer he knew the defendants were bound to place them. He referred to *Garside v. The Proprietor of the Trent and Mersey Navigation*, 4 T. R. 581; *Harman v. Clarke et al.*, 4 Camp. 159-61; *Hyde v. The Navigation Company from the Trent to the Mersey*, 5 T. R. 389; *Ratcliffe v. Bourne*, 4 Bing. N. C. 314; *Evans v. Hutton*, 5 Scott N. R. 670; *Slatterie v. Pooley*, 6 M. & W. 669; *Muschamp v. The Lancaster and Preston Junction Ry. Co.* 8 M. & W. 245; *Pickford v. The Grand Junction Ry. Co.* 12 M. & W. 766; *Black v. Baxendale and Others*, 1 Exch. 410; *Johnson v. The Midland Railway Co.* 4 Exch. 367; *Fowles v. The G. W. R. W. Co.* 7 Exch. 699; *Richards v. The London, Brighton, and South Coast R. W. Co.* 7 C. R. 839, *Whitehead v. Anderson*, 9 M. & W. 534; *Wentworth v. Outhwaite*, 10 M. & W. 449-50; *Raphael v. Pickford*, 5 M. & G. 551; *Hinde v. Whitehouse*, 7 East 558; *Rugg v. Minett*, 11 East 210; *Rowe v. Pickford*, 1 More 526; *In re. Webb et al.* 2 More 500; *Giles v. Taff Vale R. W. Company*, 2 Ellis & B. 822; *White v. Humphery*, 11 Q. B. 43.

MACAULAY, C. J.—The P. S., 10 & 11 Vic., ch. 31, sec. 23, names and provides for the appointing warehousing ports, of which the town of Brantford is now one.

The 24th section enacts that it shall be lawful for the importer of goods to warehouse the same on giving his own bond to secure the payment of duties in double the amount thereof, and in such warehouses, subject to the regulations of the Governor in council, to sort, pack, re-pack, or make such lawful arrangements respecting the same in order to the



preservation or legal disposal thereof, and to take therefrom moderate samples, without present payment of duty or entry, and to remove the same under the authority of the proper officer from such warehousing port to any other warehousing port in this province, under good and sufficient bonds to the satisfaction of such officer, *or* upon entry at any frontier port or Custom House under the authority therein mentioned to pass such goods on to any warehousing port in any other part of the province. Provided always, that such goods shall be cleared within two years from the date of the first entry and warehousing thereof, or in default, the custom house officer may sell the same for the payment : first, of the duties, and secondly, of the *warehouse rent*, and other charges, &c., and the collector or proper officer shall have full power to charge, or to *authorise the occupier of the warehouse* to charge, a fair *warehouse rent*, subject to any regulation of the Governor in council in that *behalf*.

Sec. 28.—The property in goods so warehoused to be transferable in manner and form therein provided.

Sec. 30.—The unshipping, *carrying*, and landing goods and bringing the same to the warehouse, &c., *warehouse rent* and expenses of the safe-keeping in warehouse, &c., shall be performed *by*, or *at the expense of*, the importer of such goods.

Now, confining my attention to the declaration and issues thereunder, and the evidence applied thereto, whether the expenses attending the carriage of these goods had been paid, or whether the defendants had a lien thereon for the amount of such charges, does not appear. Neither does it appear where or when the goods were first entered or bonded. All we know is, that they were by the defendants *received at* Buffalo, to be carried for the plaintiff to Brantford, and the declaration alleges there to be deposited and kept for the plaintiff, for reward, &c. That they were carried in a custom house or warehouse carriage, under lock and key, and on arrival at Brantford deposited in a custom house or bonding warehouse, belonging to and occupied by the defendants, at their station at Brantford, where they were kept (until destroyed by fire) under lock and double key, one key being

in the custody of the custom house officer, and the other of the defendants.

In this state of things I should have supposed, but it is by no means clear, that access could not be had to the goods either by the plaintiff or defendants except through the custom house officer who had a lien thereon for the duties, &c. That the defendants did carry the goods for the plaintiff to Brantford, and there *deposit* and *keep* them for him until the fire, was, as to the fact, distinctly proved. The plaintiff, however, contended that the defendant's duty as common carriers or insurers was not at an end, because they had not given him *notice* of their arrival. As a general rule it may be assumed that carriers generally speaking are bound either to make actual delivery of goods carried by them, or to give notice of their arrival to the consignee, before the responsibility for the safety of the goods resting upon them as such carriers terminates. But the present is a case attended with peculiar circumstances. The defendants, in addition to their establishment as carriers, kept a bonded warehouse at their station, whether they charged warehouse room or not, and the contract manifestly was, to carry and deposit the goods in such warehouse. Then as to the obligation to give notice. Were they bound to give such notice before depositing the goods in the warehouse? Why give a notice at that stage of the business, when the plaintiff was not entitled to demand or receive them except through the custom house officer, and when the defendants were necessarily obliged, on receiving them from the locked bonded railroad freight carriage, to transfer them to the locked bonded warehouse, under the authority and control of the custom house officer? In so depositing the goods they only fulfilled their contract, and did what, in the contemplation of all parties, was to be done. Then it appears the defendants were acting in a two-fold capacity. First—as carriers carrying goods in bond, and secondly, as warehousemen, keeping goods in bond in conjunction with the custom house officer, and consequently when the goods had been carried and deposited in such warehouse, the possession of the goods was changed from that of carriers to that of warehousemen,

after which their character of warehousemen predominated; and the real ground of complaint is, that the defendants did not give notice that the goods had been deposited in the bonded warehouse, for that was the place where alone the plaintiff could have been expected to hear of them, and the proper place for him to make enquiries after them. It seems to me therefore the defendants' duty as carriers had ceased before it became incumbent upon them to give notice, and that as carriers they had done all they undertook or were bound to do, whatever might have been their duty as keepers of the warehouse, and which character thenceforth predominated over that of carriers. The object of notice is to enable the consignee to come and receive the goods when the carriers are not bound to deliver them except at some specified place. Here they were delivered in fact at the only place where the defendants as carriers could deliver them, and being so delivered under bond subject to duties which the plaintiff was to pay, the custom house officer, so far as he jointly participated in their possession or custody, was the joint agent of the government and of the plaintiff, and not at all of the defendants. However, they may have been liable for the safe-keeping of the goods as warehousemen both to the government and the plaintiff. If liable to the plaintiff for the goods as insurers, they might be also liable to the crown for the duties, as for losing the goods *in transitu*. But under the circumstances in evidence, no such liability could attach to them; that is, regarding the fire as accidental, and the defendants exculpated from any negligence.

The foregoing observations are expressed with distrust of my judgment and with reference to the contract as stated specially in the declaration. If the declaration was not proved, it is a reason for setting aside the verdict, if it was, I think the defendants exonerated from liability as common carriers by performance, so that in either point of view, there should be a new trial.

McLEAN, J., concurred with MACAULAY, C. J.

RICHARDS, J.—Declaration charges that plaintiff, on 26th of

April, 1854, caused to be delivered to defendants, as common carriers, who as such carriers received from him certain goods and chattels, to wit, one box and one bale of merchandise, of the value of £70, to be safely and *securely carried and conveyed* on their railway for the plaintiff, from the city of *Buffalo* to the *town of Brantford*, and *there to be deposited and kept for the plaintiff*, for certain reward therefor, to be paid by him to defendants; yet defendants, not regarding their duty, did not use due and proper care in and about carrying and conveying the said goods from Buffalo to Brantford, but wholly neglected so to do; and further disregarding their duty, defendants did not use due and proper care in the depositing and keeping of the said goods of plaintiff at the town of Brantford, but wholly neglected so to do, and then so carelessly and negligently conducted themselves in the premises that the said goods, through their carelessness, negligence, and default in that behalf, became and were wholly lost to plaintiff.

2nd count.—Trover: damages, £100.

Pleas.—1st. Not guilty, per statute. 2nd. That they did not as such common carriers receive from the plaintiff the said goods and chattels, to be, after the arrival thereof at Brantford, deposited and kept for the plaintiff, for certain reward, *modo et forma*.

At the trial the only evidence of receipt by or delivery to defendants was a document partly printed and partly filled up in pencil, as follows:

“ RASSON’S DESPATCH.

“ *Buffalo, April 26, 1854.*

“ Received from Rasson’s despatch, on board the B. & N. Y. R. R. the following articles, in good order, for way stat.

A. J. Arthur .....	(box).
E. Richmond.....	(case).
Jas. Bowie.....	(box).
W. Connors.....	(box).
	3 bedsteads.

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“ L. JUDSON.”

It was shewn, on behalf of plaintiff, that he sent a person



to ask for the goods several times, and that the officer of the company to whom he applied was not aware of their arrival: he asked for them on the Monday before the fire. The fire is said to have occurred on the 9th of May (if so, that was Tuesday) whilst in other parts of the evidence the fire appears to have been on a Monday. It was not clearly shewn on what day the goods arrived in Brantford, nor does there seem to be any entry in the defendants' books in relation to them. The goods were delivered to defendants, in Buffalo, on Wednesday, 26th of April, in the usual course of business, they should have been delivered to plaintiff at Brantford in twenty-four hours. The evidence of their having been taken to Brantford is that of the custom house officer, who says they were put into a warehouse owned by the defendant which was also used as a bonded warehouse, (of which the officer had one key and defendants' servants another,) on Friday, the 5th, or Saturday, 6th of May. The value of the goods was admitted, and it was also admitted that "way stat." in the receipt produced meant Brantford.

The learned Chief Justice told the jury that in his opinion before the defendants could discharge themselves from liability as carriers they should have given notice to plaintiff of the arrival of the goods.

It is contended on the part of the defendants that their contract was not such as is set out in the declaration; that it was not to carry safely to Bantford, to be there *deposited* and kept for plaintiff, but to carry to the station at Brantford: and when they had done this their liability ceased: that it was plaintiff's business to take notice of their arrival, and that defendants were not bound to give him notice: that although it might be contended that they ought to have delivered the goods sooner, yet that it is not charged against them that they were guilty of negligence in that respect: that they were not bound to give plaintiff notice, inasmuch as the goods were in bond; and if he had received notice they could not have delivered them to him, but to the officer of customs, and therefore that he could not have taken them away.

The receipt produced certainly does not establish the

contract set out in the declaration ; but in the absence of any further contract or special custom it seems to me that when carriers receive goods at one place to be forwarded to another the inference of law is, that they are to be safely and securely carried, and there delivered *for*, if not *to*, the consignee. If this be correct, then the implied contract would be more favorable to the plaintiff than the one set out in the declaration. Now if such a contract were entered into by a carrier for bringing goods from Oswego to Toronto, without any usage or custom shewn, it does not appear to me that the court would hold that his duty as carrier ceased when the vessel reached the wharf and he placed the goods on it without notice to the consignee. In *McKay v. Lockhart* (4 O. S. 407) *Sherwood, J.*, says : “ The defendant’s liability as a carrier ceased after he had given notice to the consignee of the arrival of the goods, and had placed the cask of wine on the wharf where the plaintiff received his other goods. As a carrier from port to port has it not in his power to take care of the goods after they are placed on land, I think it but reasonable and just to hold him discharged from his liability after giving due notice to the consignee of the arrival of the goods and of the place of landing, and after landing them at a proper and ordinary time of daily business at the place so notified to the consignee, and in the manner usually followed by masters of vessels engaged in such trade.” *Macaulay, J.*, there says, “ The plaintiff should at least have had fair notice, with reasonable time and opportunity to see to the property and protect his interests before the duty or liability of the defendant could be considered at an end.” The case of *Bourne and Gatliff*, finally decided in the House of Lords, in 11 C. & F. 45, appears to me fully to confirm the doctrine here laid down. I think nothing can be more reasonable than that consignees should have due notice of the arrival of their goods before the liability of the carrier shall cease.

In the case before us, the depositing of the goods in the warehouse must be considered to be for the defendants’ benefit : they required the cars in which the goods were brought from Buffalo to use in the course of their business,

and the allowing the goods to remain in the cars until a reasonable time elapsed to take them away after notice to the consignee, as in the case of a ship, would be very inconvenient for them.

It is urged, however, that the defendant could not have taken a delivery of the goods if he had had notice, and therefore notice was not necessary. He certainly could have received the delivery *sub modo*, although the duties had not been paid; and if he had received notice he could have paid the duties, and then received the goods. If goods are sent from a foreign country here, not in bond, the consignee cannot take them away from the vessel unless the duties are paid, or an entry of some sort passed the custom house, for them; but this surely would not excuse the carrier from all liability, without notice of the arrival to the consignee.

Then as to the *non-delivery* of the goods by the defendants in due time, the case of *Raphael v. Pickford et al.* (5 M. & G. 551) may be considered as applicable. In that case the breach was that the defendants did not safely convey the goods from London to Birmingham, or safely and securely deliver the same to plaintiff, but in consequence of the negligence of defendant the goods were wholly lost to plaintiff, with special damage. On the trial it appeared that the goods had not arrived in due time, but eventually reached the plaintiffs. Defendant moved for a nonsuit, on the ground that the plaintiff had merely alleged that it was the duty of defendants to deliver safely, and not to deliver in a reasonable time, and that he had assigned a breach in not delivering at all.

*Tindal, C. J.*, in delivering the judgment of the court, said the breach might be read in effect as stating defendants did not, within a reasonable time, or at any time afterwards, deliver the goods to the plaintiff, but that by defendants' negligence they become wholly lost to the plaintiff. And if the breach had been so in form it would have been sufficient for the plaintiff to prove so much of his breach as would support his right of action, and the onus of proving the delivery would rest upon the defendants, unless they

proved a delivery within a reasonable time the plaintiff's right of action and consequently the breach alleged would be established. The rule for a nonsuit was discharged.

This case shews that even in the present state of the pleadings, the *verdict* in favour of the plaintiff may be sustained. I do not however suppose that the full value of the goods would necessarily be the measure of damage against defendants for not delivering them in due time.

The decision of the house of Lords in *Bourne v. Gatliff* (11 C. & F. 45), fully establishes that on a contract (either express or implied) to deliver in London, the duty and liability of a carrier cannot be considered as terminated on discharging the cargo without notice. In that case the Lord Chancellor says, page 58, "This is a contract to deliver. The owner of the goods is at London, and could conveniently receive notice; or if at Liverpool, or any other distant place, would have an agent here to whom notice could be given. Can the master be discharged by immediately landing the cargo without notice?" At page 56 he says, "You must maintain that the master may unload instantly, and put the goods on a wharf without any notice to the owner, or without any delay on his part—(Lord *Brougham*); and that you may thus throw on him the charge of wharfage, which, on receiving reasonable notice, he would be prepared to avoid." Lord *Campbell*, at page 55, "You must go the length of alleging that the instant the master arrives he may, without notice to the consignee, land the goods. Where is the authority for that proposition?"

If I am correct as to the legal effect of the contract shewn or arising from the receipt produced, it appears to me that the evidence is sufficient to support such a contract, and that it will be useless to send the case down to a new trial to allow the plaintiff to amend his declaration to adapt it to the contract, which was in effect proven. At all events if we do grant a new trial, on the ground of variance between the contract shewn and that proven, we should express our opinion on the main question argued before us, viz., that the liability of a carrier, without special contract or custom to that effect, does not terminate on the goods being



deposited in a warehouse at the place of delivery, without notice to the consignee.

Should the case be taken down to a second trial it may be well to ascertain clearly whether the goods were demanded from the company at any time after they reached Brantford, and before the fire: the evidence is not very clear on that point.—1 American Railway Cases, at 410, in note; *Stevens v. Boston and Main Railway Co.* 1 Gray's Rep. 277.

The evidence given of the arrival of the goods at Brantford by the officers of the company was of a very unsatisfactory character; and, as I have before mentioned, no entry of their receipt by the company or of their arrival at Brantford was made in their books. The facts of the case certainly shewed an absence of proper management of the affairs of the company in relation to the entering of these goods in their books, and in consequence thereof an uncertainty as to what may have become of them arising from their misconduct.

Rule absolute, RICHARDS, J., dissenting.

## O'NEILL v. THE GREAT WESTERN RAILWAY COMPANY.

*Common Carriers—Railway Company—Liability as such.*

The declaration alleges that plaintiff caused to be delivered to defendants as common carriers, two cases and one bale of goods, value £150 7s. 4d., to be safely conveyed from the Suspension Bridge to Toronto, within a reasonable time for certain hire. Breach, that defendants did not, within such reasonable time, take care of and convey the said goods to Toronto, and never delivered the same. Plaintiff on the 24th of July, 1856, received a notice that "the undermentioned goods consigned to you have arrived here this day, we will thank you to send for them as soon as possible as they remain here at your risk and expense."

The goods were spring goods, which had arrived at the Suspension Bridge on the 5th of April, and on the 11th of March, and being unsaleable at the time of receipt of notice, plaintiff refused to take them.

*Held*, that the goods being bonded goods, subject to duty, and defendants having conveyed them within a reasonable time to their places of destination, they were *not bound* to give notice of their arrival there and their duty as common carriers had ceased. The decision in *Bowie v. The B. B. & G. Railway company*, confirmed.

The declaration filed the 23rd of December, 1856, stated that defendants were common carriers, and plaintiff caused to be delivered to them two cases and one bale of goods, containing, &c., of the value of £150 7s. 4d., to be taken care of and securely conveyed by defendants from the Suspension Bridge to the City of Toronto, and there to be

delivered by defendants for plaintiff, within a reasonable time for certain hire. Breach, that defendants did not within such reasonable time take care of and convey the said goods to Toronto, nor there nor at any other place within a reasonable time deliver the same to the plaintiff, nor have defendants ever delivered the same.

*Pleas*—1st. Not guilty. 2nd. That plaintiff did not deliver, nor did defendants receive the said goods. Issue.

The cause was tried at Toronto in January last, before *Hagarty, J.* The plaintiff, in February or March, 1856, received invoices of goods, one bale from Glasgow, and two cases from London. The plaintiff, on the 24th of July, 1856, received an advice note, dated at Toronto station, stating that "the undermentioned goods consigned to you have arrived here this day, we will thank you to send for them as soon as possible, as they remain here at your risk and expense." This was printed. Then followed a statement principally in writing, shewing that the two casks came from the Suspension Bridge on the 5th of April, and the bale from the same place on the 11th of March. The plaintiff then refused to receive the goods: they were intended for spring sale and the season had passed. On the 26th of November, 1856, the plaintiff notified the defendant that he should look to them for payment. The only marks on these three packages were O.N.T. and the number. It was proved that such goods could only have been sold at the end of July, unless at a sacrifice. It was stated by one witness that he believed plaintiff had sent to defendants to enquire after these goods in May last, and had sent to different forwarders for the same purpose. It was also stated that it was usual to send the names of the consignees on from one railway to another, as the goods come on. For the defence, it was objected that no contract was shewn between the plaintiff, the consignee, and the defendants; that the defendants' contract was with those from whom they received the goods. It was proved by the station master at Toronto, that he sent on the 11th March notice to the parties mentioned in the freight invoice produced, of the arrival of the goods on that day. He remained there until the 20th of April, during all which time no enquiry, to his knowledge,

was made respecting plaintiff's goods. He swore positively that he made out a notice to P. J. O'Neill, and sent it to the post. On cross-examination, an advice note was shewn him, dated 12 March, 1856, which he stated he sent, it was addressed to J. P. O'Neill, and he said he knew there was a firm of J. & P. O'Neill in Toronto, but if this notice was sent to them it was a post office mistake. Another witness was called, who said he was station master up to November last, and never heard any enquiry made for P. J. O'Neill's goods. He said the course of business was that the original notices were copied from the way-bill, then entered in the warehouse book, from which the subsequent notices would be copied. The July notice was taken from the original invoice. He said that if the goods had been marked to plaintiff, and not O.N.T. only, there would have been no mistake. That it was possible the plaintiff might have sent for the goods, but he (witness) was generally there, and that plaintiff could readily have traced them had he come between March and July. The goods were placed in the bonded warehouse being subject to custom duties. The plaintiff then called Patrick O'Neill, who stated that his firm received advices of these goods three or four times, but they paid no attention to them, as they had no such goods coming. He sent some of them during the summer to the plaintiff, but he could not say when. Plaintiff's clerk said it was before July. Mistakes occurred from plaintiff receiving letters intended for the firm in which Patrick O'Neill was a partner, and *vice versa*. The learned judge told the jury there was no delay shewn in carrying the goods, the delay arose with regard to the notice. If they were of opinion that there had been unreasonable delay in giving notice, they should say what damage this had occasioned the plaintiff, who might have got his goods in the latter part of July. It was agreed that defendant should have leave to move for a nonsuit on the evidence. As to injury arising from want of notice, the defendants' counsel insisted that they had carried the goods according to the only contract arising on the evidence, and were not bound to notify. The jury said no notice had been sent until July, and found for plaintiff £48 11s. 3d.

In Hilary Term *Galt* moved for a nonsuit on leave reserved, or for a new trial on the law and evidence. He objected that it should not have been left to the jury to find damages based upon an estimate.

*S. Richards* shewed cause. He cited *Raphael v. Pickford*, 5 M. & Gr. 551 ; *Bourne v. Gatliff*, 3 M. & G., 643. Same case 11 C. L. & F. 45, 70 ; *Bowie v. Buffalo and Brantford R. W. Co.*, the preceding judgment.

DRAPER, C. J., delivered the judgment of the court.

In this case the goods were imported into this province *via* the United States, and were subject to duty. They were brought, as it were, in the charge of the customs authorities, though carried by the defendants, at the expense of the plaintiffs. At the same time they were, as to the carriage, and to liability for safe keeping, in the defendants' hands, and at their risk, in the same manner as any other goods which they carried, and with which the custom house officers had no concern: Admitting, then, to the fullest extent all that is said in *McKay v. Lockhart* (4 O. S. U. C. 407), it appears to me that, whether the defendants were treated as contractors simply, or as subject to a duty imposed by law on the character of their occupation, the circumstances of the case are sufficient to materially qualify any implied contract or duty. The defendants could not deliver, in the usual acceptation of that term, these goods to the plaintiff. The law of customs interposed, and compelled them, having completed the transport of the goods, to deposit them in a warehouse from which, without reference to, and the express permission of, the custom house authorities, they could not be removed. And this deposit, in a place of security, and subject to an authority the defendants were bound to obey, appears to me, so far as the defendants are concerned, to amount to a completion of their contract or duty. The plaintiff, as the importer of these goods, is necessarily aware of their liability to duties. The parties who ship them from Europe, and those to whom they are consigned at the sea port of arrival, must be assumed to have forwarded invoices and notification of their arrival at such sea port, and



of their being forwarded onward. In the present case the goods arrived at New York or Boston, and the agents there must have delivered them to some forwarding company or common carrier there, from whom they would receive an acknowledgment of their receipt, and of the duty they undertook to discharge in respect to them; and this acknowledgment we ought, I think, to presume reached the plaintiff, and if it did not, that circumstance could not affect the defendants' liability. It is even possible that such an agreement would be disclosed by this instrument as would shew the defendants could only be looked upon as sub-contractors, or agents for the transport of these goods, and not as entering into any contract, or undertaking any duty with or towards the plaintiff directly. However this may be, the plaintiff must be taken to have known of the arrival of his goods by sea, of their transmission onwards, both as to parties undertaking to forward, and the time when such undertaking was entered into, and the time at which according to usual course they should have arrived here, he knew also they must be placed in a warehouse subject to the control of the custom house authorities, to whom application for leave to remove them was indispensable, and that such application must proceed from himself, and could not proceed from the defendants. Now, it appears to me, under such circumstances all the defendants were compelled to do was to deliver the goods at the bonded warehouse within a reasonable time, and this they have done. And I think that with regard to imported goods, subject to duties, the law imposes no further obligation on the defendants, than to deliver them where the law requires them to be delivered; and that though for convenience sake, they have adopted a system of giving notice, yet that the omission to do so, under circumstances like the present, will not subject them to an action as for unreasonable delay in delivering implied from their not having given such a notice.

In saying this, I am by no means questioning the doctrine in *McKay v. Lockhart*. I agree that the general rule is, that a common carrier for hire must either deliver the goods, or give notice to the consignee of their arrival at the place,

where under the circumstances of the express or implied contract it is his duty to take charge of them. I mean only to say, and where goods are imported in bond, the law alters this general character of the common carriers' contract, by imposing the obligation of depositing them in a bonded customs warehouse, and that by such delivery the contract of the common carrier is fulfilled. The goods are delivered for the plaintiff at the only place where the defendants could lawfully deliver them, and the defendants were not, as I think, bound both to deliver and to give notice, and therefore their duty as common carriers was fulfilled. In principle this case is not distinguishable from that of *Bowie v. The Buffalo and Brantford Railway Company*, already decided in this court. And though the opinion of *Macaulay, C. J.*, was expressed with some degree of doubt, and though I do not, so far as my own opinion is concerned, desire to undervalue the weight of the arguments advanced in favour of a contrary view, I still think the law to be in favour of the defendants, and were I even more doubtful, I should at all events not be willing to overrule a judgment already given here, unless upon the clearest conviction.

Rule absolute for nonsuit.

The Chief Justice referred to 11 C. & F. 45, *Bourne v. Gatchiff*, 3 M. & Gr. 643; *Garside v. Trent, &c., Navigation Co.*, 4 T. R. 581; *Hyde v. Trent, &c., Navigation Co.*, 5 T. R. 389; *Muscamp v. Lancaster and Preston Junction R. W. Co.*, 8 M. & W. 421; *Watson v. Ambergate, &c., R. W. Co.*, 15 Jur. 448; *Whitehead v. Anderson*, 9 M. & W. 518; *Pickford v. Grand Junction R. W. Co.* 12 M. & W. 766; *Wentworth v. Authwaite*, 10 M. & W. 436; *Johnson v. Midland R. W. Co.*, 5 Exch. 367; *Fowles v. Great Western Railway Co.*, 7 Exch. 699; *Richards v. London, Brighton, &c., Railway Co.*, 7 C. B. 839; *McEwan v. Smith*, 13 Jur. 265.

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## CORBY ET AL. V. COTTON ET AL.

*Demurrer—Pleadings—Waiver.*

Declaration on a bond conditioned to convey to the plaintiffs within three months a certain steamboat, and for quiet possession of the same from the making of the bond, assigning as breaches, 1st, For not conveying within three months. 2nd. For an eviction by one O. S. G. under the powers of a mortgage derived from the defendants. Pleas: to the first breach, that said steamboat was mortgaged to J. H. C. at the time of execution of the bond, for the same amount as plaintiffs had agreed to pay defendant's, and that defendant had handed him the notes given by the plaintiffs for the price; and the said J. H. C., held the mortgage only as security for due payment thereof, and plaintiff's thereupon discharged defendants from procuring such conveyance. Plea to second breach, after stating a similar agreement, alleged a transfer of the mortgage from J. H. C. to O. S. G., and that plaintiffs made default in their agreement by default of non-payment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignees.

Both pleas held bad on demurrer.

The plaintiffs engaging to apply their payments towards an encumbrance not amounting to a waiver of their right to a conveyance from the vendors.

*Wilson, Q. C., and S. Richards*, supported the demurrer.  
*Connor, Q. C., and Macdonald*, contra.

DRAPER, C. J., delivered the judgment of the court.

I believe that both my learned brothers were of opinion in favour of the plaintiffs on these demurrers at the close of the argument, and I so entirely concurred with them, that we should probably have given judgment at once, if we had not been informed that a similar question had been argued and stood for judgment in the Queen's Bench.

We have since seen that judgment, which was delivered last Monday, and which is in full accordance with our own impressions.

The condition of the bond is, that the obligors should, within three calendar months, convey by a valid deed to the plaintiffs the steamer "City of Hamilton," and the absolute title to the same, free from all incumbrances, and that the plaintiffs should, from the making of the bond peaceably and quietly have, hold, &c., the said steamboat without the let, suit, &c., of any person whatever lawfully claiming; and the defendants should at all times thereafter warrant and defend plaintiffs in full possession and quiet enjoyment of the said steamboat against all claims and demands whatsoever.

The first breach assigned, is for not conveying or causing to be conveyed to plaintiffs, within the said three months, or at any time since, the said steamboat, free from incumbrance, or otherwise howsoever.

The second breach is, that plaintiffs did not, nor could at all times since the making of the bond, peaceably and quietly have, hold, &c., the said steamboat, without the let, suit. &c., but on the contrary, one O. S. G., who before that had, and still has, lawful claims, &c., entered upon the said steamboat when she was in possession of the plaintiffs, and seized and took possession of her against the will of the plaintiffs, and expelled plaintiffs therefrom by due process of law, and excluded plaintiffs therefrom, which claim of said O. S. G. was not derived from the plaintiffs, whereby, &c.

To the first breach defendants say that the said steamboat before and at the time of the execution of the said bond, was mortgaged to J. H. C., to secure the like sum, payable at the same times as the promissory notes in the bond mentioned, and thereupon in consideration that defendants would deliver the said promissory notes to the said J. H. C., in order that the proceeds thereof when paid to him by the plaintiffs, should be applied in satisfaction of the latter sums secured by the mortgage, and in consideration that plaintiffs would forbear to require the execution of the conveyance to them, the said J. H. C. agreed with the plaintiffs, with the knowledge and consent of the defendants, *that C. should hold the mortgage only as a security for, and until the payment by plaintiff of the said promissory notes, and should upon payment thereof release the said steamboat to the plaintiffs, with the appurtenances.* And defendants thereupon, at the request of the plaintiffs, transferred the said notes to the said J. H. C., who thenceforth held the mortgage to secure the payment thereof, and plaintiffs thereupon discharged defendants from procuring the conveyance of the said steamboat within the period of three calendar months.

To the second breach the defendants plead, that after the making of the bond and the transfer of the said promissory notes to the said J. H. C. as in the former plea mentioned. J. H. C. for valuable consideration transferred his whole



interest in the said mortgage, and in the said promissory notes to O. S. G. in the declaration mentioned, and while he was holder of said notes and assignee of said mortgage, plaintiffs made default in their agreement by nonpayment of one of said promissory notes, and said O. S. G. thereupon brought the said action of replevin in the declaration mentioned, which is the possession of the said steamboat by the said O. S. G. in the second breach referred to. And so defendants say that O. S. G. obtained possession of the said steamboat, claiming the same as an equitable interest therein by virtue of an agreement so as aforesaid made by plaintiffs with the said J. H. C. and his assigns.

Each of these pleas confesses a breach of the condition of the bond. The first asserts an agreement before breach by which the plaintiffs discharged the defendants from making the conveyance of the steamboat within three calendar months, without pleading that such agreement was under seal.

The second asserts the same agreement, and charges that the plaintiffs were in default in fulfilling a condition to be performed on their part. But this alleged condition is a part of the agreement stated in the plea to the first breach, and unless that agreement is binding as a discharge of the defendants from their bond, this plea is equally bad with the former.

I take the plea in the first breach to assert that the plaintiffs by the terms of the alleged new agreement discharged the defendants from observing the condition to convey. The agreement as pleaded must have been made after the bond was executed, or the plaintiffs could not have discharged the defendants from observance of the conditions. But being aware of the mortgage to J. H. C. it is said they thereupon agreed to pay him the money which they should have paid the defendants, as the remainder of the price of the boat, to satisfy this mortgage, and further agreed to forbear to require the conveyance of the vessel to them. Now, it appears to me, we must treat the allegation of defendants' discharge from making the conveyance as an allegation of a part of the agreement, for I cannot see on what principle

we could infer such a result as a matter of legal consequence, for it amounts to this, that purchasers who were by their agreement entitled to a conveyance within a fixed time, and free from incumbrances, are to be considered as waiving or forfeiting that right, because there being an incumbrance not due they engage to apply their payments to satisfy it as it falls due, leaving the vendors in possession of their legal title and ownership, and without any right to have security other than the bond against the possible disposition of the boat either by the vendors or by their creditors upon execution.

We are of opinion neither plea affords an answer to the breach to which it is pleaded.

Judgment for plaintiffs.

On the argument the following cases were referred to :  
 Burgh v. Preston, 8 Term R. 483 ; Williams v. Jones, 5 B. & C. 108 ; Thornton v. Jenyns, 1 M. & G. 189 ; Sellers v. Bickford, 1 Moore 460 ; Besant v. Cross, 15 Jurist 828.

CAMERON ET AL., ASSIGNEES OF ESTATE OF DANELEIT V.  
 THE MONARCH ASSURANCE COMPANY:

*Insurance policy—Conditions—Non-performance of.*

Action on a policy of insurance for £500. The case turned upon the 11th condition on the back of policy, by which plaintiff is bound within 14 days, to furnish a statement of claim with proof thereof by affidavit or affirmation. Held, that plaintiffs were bound by the condition endorsed upon the policy, and having violated it, they lost their claim upon the defendants, but thinking they could give evidence of a waiver of this condition, and asking for a new trial, the court granted it on payment of costs. As by entering a nonsuit, it would be equivalent to a verdict for defendants, the six months having expired within which the action must be commenced.

This is an action on a policy of assurance against fire for £500 on a stock of goods, the property of the estate alleged to have been lately destroyed by fire. Many pleas are on the record traversing the interest of plaintiffs : the loss ; that plaintiffs not assignees ; that loss occasioned by wilful neglect, and that false accounts given of loss ; that property erroneously described, &c. The 6th plea averred that plaintiffs did not within fourteen days after loss (according to the 11th condition of policy) deliver as particular account of the

loss as the nature of the case would admit, and with proof of the same by affidavit, or affirmation of the plaintiffs, and produce other reasonable evidence specifying the account in detail, &c.

Issue was taken in all these pleas.

At the trial at Brantford, before *Burns, J.*, a very large mass of evidence was gone into on both sides. The defendants endeavouring to shew that the loss was caused by the fraud of Daneleit, and was not *bona fide*, and objecting that the policy was not complied with, as the plaintiffs had not made oath or affirmation of the loss, but rested on the affidavits of Daneleit, who, as their agent, was in possession of the goods, and had been carrying on the business under a deed of assignment made by him to plaintiffs for the benefit of his creditors.

The 11th condition of the policy was, that all persons insured and sustaining loss by fire should forthwith give notice to assurers, and to deliver in a particular account of the loss, &c., “*and make proof of the same by their affidavit or affirmation, &c., &c.*,” “*and until such affidavit or affirmation, account and evidence are produced, the amount of such loss or any part thereof shall not be payable or recoverable.*”

Leave was given to move to enter a nonsuit, or verdict for defendants on the point raised by the sixth plea on the non-production of plaintiff's affidavit. The jury found all the issues for plaintiffs.

Last Easter Term *O'Reilly, Q. C.*, moved on the leave reserved, or for new trial on the law, evidence and misdirection.

*M. C. Cameron* shewed cause.

*Marks v. Hamilton*, 7 Ex. 323; *Waters v. Monarch Insurance Company*, 5 E. & B. 870; 1 *Arnould*, 229; *Merrick v. Provincial Insurance Company*, 14 U. C. 449; *Shaw v. St. Lawrence Insurance Company*, 11 U. C., 73, were cited on the argument.

*RICHARDS, J.*—This case turns on the construction, to be put on the 11th condition, endorsed on the back of the policy, the portion of it brought in question being substantially this: that all persons sustaining loss are forthwith to

give notice to the company, and as soon as possible after (within 14 days) are to deliver in as particular an account of their loss as the nature of the case will admit of, and make proof of the same by their affidavit or affirmation, and produce such other evidence as the directors of the company may reasonably require, \* \* \* and until such affidavit or affirmation, account and evidence are produced, the amount of such loss or any part thereof, shall not be payable or recoverable. The clause further provided that the assured shall, if required, produce the certificate of one or more magistrates, or a notary or clergyman importing that they are acquainted with the character and circumstances of the assured, and they verily believe that they, by misfortune, and without fraud, have suffered loss to the amount claimed by them, and until such certificate is produced the loss shall not be payable.

It is further provided in that condition, that if their appears any fraud in the claim made, or false swearing in support thereof, the claimant shall forfeit all benefit under such policy.

It will be observed that according to the condition, until the affidavit of the claimant or the certificate of loss by the magistrate, notary, clergyman, &c. is produced, the amount of the loss shall not be payable. But when there is fraud or false swearing it is declared that the claimant shall forfeit all benefit under the policy. Looking at the mode in which this property was insured, it does seem that the rigid enforcement of this condition imposes a hardship on the plaintiffs if we consider the matter in relation to this part of the case only. The plaintiffs insured as assignees of one Daneleit, on the stock in trade, which he had assigned to them for the benefit of his creditors, and the business was continued under the supervision of Daneleit, who was really the only person who knew all about the loss, the plaintiffs personally taking no part in the management of the business. Daneleit made the affidavit of loss, &c., which was furnished to defendants about the middle of July, the fire occurring on the 4th of that month. The action was commenced about the middle of April, and the defendants pleaded on the 2nd of May,



and amongst other things, that plaintiffs did not make proof of the loss by their affidavit, &c. During all this time it does not appear that defendants ever required plaintiffs to furnish their affidavit, or that they objected to pay the loss because it was not furnished, but at the trial they take this ground of defence. It may be, and probably is, open to them on the strict law of the case, but I think it is usual for insurance companies to state objections of this kind to parties insured that they may be removed if possible before litigation takes place on the point. Whether the defendants by their conduct have waived their right to demand this affidavit does not arise on the pleadings in the cause, as the plaintiffs have taken issue on the defendant's plea, expressly raising the question as to making proof of the loss by the affidavit or affirmation of the plaintiffs.

The case of *Mason v. Harvey* (3 Exch. 819); appears to be a strong authority in favour of the defendants on these pleadings, and looking at the cases there, and the reasoning in relation thereto, which are referred to by my brother *Hagarty* in his judgment, I feel constrained to concur with him in making the rule absolute to grant a new trial payment of costs by plaintiffs. As to the point raised by Mr. Cameron, that the plaintiffs do not aver in the declaration that they made proof by their own affidavit, but that they made proof by Daneleit, and defendants having pleaded over; that their plea that plaintiffs did not make proof is not in answer to any thing in the declaration. But there is a general averment of performance of conditions precedent, and defendants having raised this point in their 6th plea, and plaintiffs having taken issue thereon, we think it is an issue at all events on the record which we cannot overlook. As to the point raised by defendants that plaintiffs had no insurable interest in the goods, and that they ought to have been insured as goods in trust, &c. We think the assignment sufficient to pass the goods to plaintiffs as between them and defendants, and they have an insurable interest in them either because the goods are theirs from the assignment or by the purchase of the articles subsequent thereto. They are either answerable over for the value or proceeds of the

goods to the creditors, and are liable to pay for those which were purchased since the assignment, or for the money when money was received for them, they consequently have an insurable interest. They might perhaps be liable over also if they did not effect insurance. We think the authorities referred to shew that plaintiffs had an insurable interest.

We grant the new trial in this case with a view of enabling the plaintiffs if they can do so to shew a waiver of the condition, the non-compliance with which we think fatal to their case.

HAGARTY, J.—After the searching investigation which the case received at the trial, and the local charges of fraud and felony made by the defendants, negatived as they were by the jury, I do not think that we would be warranted in the practice of the courts in such cases in the absence of misdirection to subject the plaintiffs again to the opinion of another jury. The case is not free from suspicion on the merits, and had the jury found for defendants, we should have hardly felt warranted in interfering. But on the issues raised on the 6th plea as to the absence of any affidavit by the plaintiffs, I have come to the conclusion that the defence is entitled to prevail.

The 11th condition expressly declares that until such affidavit be produced the loss shall not be recoverable. The plaintiffs admit that have made no affidavit although not prevented by absence or other stated obstacle, and insist that the affidavit of Daneleit, which was put in, sufficiently complies with the letter and spirit of the conditions. That he was the person best acquainted with the nature and extent of the loss, whereas the plaintiffs, being merely trustees for creditors, had not the requisite knowledge of the facts to enable them to make the required proof.

I do not see how a court of justice can deny to an insurance company the plain right of insisting as a condition of their liabilities that the person whom they undertook to assure, shall, if a loss occur, pledge his personal faith to the honesty of his claims, nor how we can accede to the plaintiff's argument that the assured can depute to another the

pledge of personal veracity which the underwriter bargained he should make himself. Insurances are often effected on the personal character and reputation of the persons desiring to be insured. I think we would be withdrawing from underwriters a serious amount of the protection for which they pointedly contract if we decide that the assured may furnish to them the oath of another in whom they have no confidence, and for whom possibly they would not have been willing to underwrite.

The well known case in error, *Worsley v. Wood* (6 T. R. 710), seems expressly in point, and is quoted as good law by all text writers. There the policy required that the assured should procure the certificate of the minister and churchwardens, and of some reputable householders of the parish importing that they know the character, &c., of the person assured, and of their belief of their good faith, &c., of the claim.

The plaintiffs averred that they had applied to the ministers and churchwardens to certify, but they had wrongfully refused. The case was very fully argued after verdict for plaintiffs, and Lord *Kenyon* pronounced judgment for defendants in the absence of the certificate, stating very fully the grounds of his judgment; that the condition was precedent; that it was not unreasonable, and that plaintiff had no right to substitute any other kind of proof than that contracted for; and that although it was an undertaking for the act of a stranger, it was binding and must prevail. His judgment is concurred in by Ashurst, Grose, and Lawrence, (the latter a high authority in insurance law), all the judges giving their reasons at length. *Rutledge v. Burrell* (1 H. Bl. 254), *Oldman v. Bewick* (2 H. Bl. 577), are to the same effect; *Park on Insurance*, 662; *Hammond on Insurance*, 107. Now to my view the case before us is much stronger against the plaintiffs. In the cases cited, they undertook for the act of strangers, and complained with some shew of reason, that they were wrongfully refused the required certificates from parties over whom they had no control. Here no such difficulty occurs. Their own statement on oath is, as I think, most reasonably contracted for, and I see no excuse for its non-production.

I think that both the letter and the spirit of this policy will be violated unless we insist on the condition being adhered to.

As the plaintiffs may possibly on another trial be able to supply the necessary evidence, and they wish a new trial, we will grant it on payment of costs, as taking a nonsuit now would be equivalent to entering a verdict for defendant, as this action must be commenced within six months after the loss, under the terms of the policy as they are stated to us.

Rule for new trial absolute on payment of costs.

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### KENNEDY V. HALL ET AL.

#### *School Acts—Variance—Personal liability of trustees.*

In an action of replevin for goods of school trustee distrained under an award for the salary of a school teacher, declaring the trustees individually liable on the ground "that the trustees did not exercise all the corporate powers vested in them by the school acts for the due fulfilment of the contract" made by them with such teacher.

*Held*, that the award as evidence did not support pleas which averred as required by the 13 & 14 Vic., ch. 48, sec. 10, a wilful neglect or refusal by the trustees to exercise their corporate powers as the ground for making them personally liable.

*Held*, also, on the facts that the defendants as trustees were not personally liable, the award ascertaining for the first time the exact amount due to the teacher, and declaring the trustees personally liable without giving them any opportunity to exercise their corporate powers to raise the money to pay it.

The action being of replevin, *Held*, no notice of action was required.

**REPLEVIN.** 1st plea—by Scobie & Sinclair, that plaintiff and H. Kennedy and John Murray were school trustees of section 5 in Oneida: that they agreed with one Naylor as school teacher: that differences arose, between teacher and trustees as to salary and other matters in dispute: that a reference under school acts was had. Defendant Sinclair acted for Naylor, D. Ferguson for the trustees, and defendant Scobie was named by the local superintendent: that all parties appeared and submitted themselves to the award of these three or any two of them: that Ferguson refused to join in the award: that Scobie and Sinclair made their award in the premises, dated August 4, 1856, and awarded that the trustees agreed with the teacher that he should teach the school for nine months from 11th March, salary at £100 per



annum, contingent on obtaining teacher's certificate, 2nd class, which he did obtain: that they accepted him as teacher, and he entered on and discharged his duties till forcibly dismissed by the trustees: that £50 was payable for said services under the agreement, and a further sum of £3 5s. 9d. under the statute for twelve days the trustees were in default in paying him according to agreement: that the trustees had wilfully neglected or refused to exercise the corporate powers vested in them under and by virtue of the statutes in such case made and provided, whereby under and by virtue of the statutes, &c., the trustees were personally liable for the fulfilment of such agreement; and that they should personally pay such sum, with £6 15s. for arbitration costs forthwith, and in default of immediate payment, same to be collected pursuant to statutes; and because trustees made default in that behalf the arbitrators Scobie and Sinclair, as such arbitrators, made and by virtue of the statutes issued a warrant to defendant Hall, duly named therein, to enforce collection of such moneys so awarded, and delivered same to Hall to be executed, and Hall to enforce payment, &c., levied on plaintiff's cattle, &c. *Quæ sunt eadem*, &c.

2nd plea by same defendants, that grievances charged against them relate wholly to judicial acts done by them, acting *bona fide* within their jurisdiction in judicial capacity of arbitration under the common school acts, in a difference between plaintiff and others, trustees of a school section, and Naylor, school teacher, in regard to his salary as teacher, and the sum due him, and other matters in dispute, &c.

3rd plea by same defendants as the 2nd, that no notice of action was given, that cattle &c., were in possession of plaintiff after the seizure: that action brought to try the property for the supposed trespass in taking them under the writ, and for express purpose of depriving defendants of protection of statutes, &c.

4th plea by defendant Hall, setting forth the award as in 1st plea, and the issue of warrant to him under which he justifies seizure.

5th plea by Hall, that the grievances charged against him relate wholly to acts of his under the statutes acting in good

faith, as the person named in the warrant issued by the other defendants as arbitrators within their jurisdiction between the parties in difference.

6th plea by Hall same as the 5th plea, adding that no notice of action given to him that cattle seized were after seizure and before suit delivered back to plaintiff: that action not brought to determine the property in such cattle, but for the supposed trespass in seizing them under the warrant, and expressly to deprive the defendants of the protection of the statutes.

Replication by plaintiff to 1st plea of Scobie and Sinclair, traversing that they make such award *modo et forma*.

And to 4th plea of Hall the bailiff a similar traverse of the making of the award.

To the 2nd, 3rd, 5th, and 6th pleas the plaintiff demurs. Joinder and issue.

At the trial, before *Gowan, J.*, at Cayuga, defendants produced and proved an award executed by Scobie and Sinclair, dated 4th of August, 1856, its material parts are as follows:—It recites that differences had arisen between Naylor and the trustees, and to put an end thereto the parties had agreed to refer all questions, differences and disputes whatsoever to their award, and that of Ferguson, an arbitrator in the premises named under the school acts: that Ferguson declined to join in award, and they awarded, that a verbal contract or agreement was concluded between said parties, the local superintendent being present, to teach the school for a period of six months from 11th of March last, at a salary of £100 per annum, conditional on his obtaining a 2nd class certificate, &c.: that he did obtain it, was accepted by the trustees, entered on his duties, and continued to discharge them until forcibly dismissed or ejected by trustees: that no satisfactory proof that teacher did not properly discharge his duties: that “the trustees did not exercise all the corporate powers vested in them by the school acts for the due fulfilment of said contract or agreement made by them: that without proper and due enquiring or investigation they took upon themselves the responsibility of dismissing the teacher in violation of the said contract and without

reference to the local superintendent or any other lawfully constituted authority." A reference is then made to a school meeting and an extract given from a letter not apparently relevant. It then proceeded to award that there is now justly due and owing to said F. Naylor from the said Hugh Kennedy, William Kennedy, and John Murray the following sums, for which they are individually liable, viz., the sum of £50, being the full amount allowed by us to said N. Naylor under said contract or agreement, also the sum of £3 5s. 9d., being for twelve days from 23rd of July to this date, as authorised by 17th sec. of Act 13 & 14 Vic., ch. 48. It then awarded £6 15s. to be paid by defendants as costs of arbitration. "And we do further order and direct that said sums are due and payable forthwith, and in default of immediate payment to be collected as directed in the said common school acts."

It then directs publication to be made by serving a copy on any one of the trustees, and concludes.

At the trial plaintiff's counsel made several objections. That the award was bad on its face, in not shewing that trustees wilfully neglected or refused to exercise corporate powers, &c.; that contract was with trustees in corporate capacity, and the award is against them personally: that award does not shew an agreement in writing under corporate seal—the contrary appearing that a verbal agreement only was made, and the relation of trustees and teacher never existed.

The learned judge ruled that the only question to be tried was as to the making the award, and told the jury that the only point for them to determine was, did the arbitrators make an award in terms of the defendants' pleas; and that as the document put in was proved to have been executed by two of the defendants, they should take it as an award and find for the defendants.

The learned judge on the ruling above mentioned directed a verdict for defendants, reserving leave for plaintiff to move to enter it for him for 10s. if the court be of opinion that he is entitled on the facts and objections above urged.

In Easter Term Mr. *Start*, for plaintiff, moved on the leave reserved.



*E. Martin* and *J. Martin* shewed cause for defendants.

The demurrers was also argued in the same terms—*Russel* on Awards 520, 530; *Adcock v. Wood* 6 Ex. 814; *Aitcheson v. Cargey*, 2 Bing, 199; *Roper v. Levy*, 21 L. J. 28, Ex.; *Hall v. Hinds*, 2 M. & G. 847; *Flaviell v. Eastern Counties Railway Co.*, 2 Ex. 349; *Dressa v. Stansford*, 14 M. & W. 822. As to replevin lying *Jones v. Johnson*, 5 Ex. 876; *George v. Chambers*, 11 M. & W. 149.

HAGARTY, J., delivered the judgment of the court.

The chief difficulty that I feel in disposing of the case arises from the narrow issue presented to us by the plaintiff in replying no such award to the pleas. Many of the objections which suggest themselves to the defences might probably have been more conveniently disposed of in another shape.

It would appear from the latest authorities that on this issue it is not open to question the award for legal objections patent on its face. We have therefore to consider whether the award given in evidence supports the pleas.

The pleas were simply that the trustees "made an agreement" with the teacher and engaged him to teach, and makes the award declare that the trustees "agreed with the teacher," without averring that the agreement was in writing or under the trustees' corporate seal. The award produced recites that there had been "a verbal contract or agreement."

The case of *Quin v. School Trustees* (7 U. C. Q. B. 130), decided that in an action for improperly refusing to retain the teacher for an agreed period a sealed contract by defendants as a corporation was necessary.

It may be that this objection taken by the plaintiff is not open to him on this issue, and that our giving effect to it now would be practically to open the award and decide that the arbitrators came to a wrong legal conclusion; and further that the trustees would at all events be liable for the services actually rendered by the teacher on the law of the recent decision of the Court of Appeal. (*Pim v. Municipal Council of County of Ontario*.)

A more important objection on the score of variance will



be seen on examining the grounds on which the defendants here seek to shew a personal liability on a plaintiff as a school trustee.

The plaintiff and two others as school trustees were by statute a corporate body under 13 & 14 Vic., ch. 48, sec. 10. As such they are empowered to contract with and employ teachers, to sue for school rates, &c., by their name of office and by sec. 16, to exercise these corporate powers for the fulfilment of any contract or agreement made by them, "*and in case any of the trustees shall wilfully neglect or refuse to exercise such powers he or they shall be personally responsible for the fulfilment of such contract or agreement.*"

The 16 Vic., ch. 185, sec. 15, provides that the arbitrators "to enforce the collection of any sum or sums of money by them awarded to be paid," and power is given to collect "by seizure and sale of the property of the party or corporation against whom the same is rendered," &c.

A wilful neglect to exercise corporate powers is thus made an essential condition of personal liability. The pleas here aver as already noticed a wilful refusal or neglect to exercise the corporate powers vested in them under the statutes, whereby under such statutes the trustees were personally liable for the fulfilment of such agreement, and that it was awarded that they should personally pay the moneys awarded.

The award in evidence says, "We find that the trustees did not exercise all the corporate powers vested in them by the school acts for the due fulfilment of such contract or agreement made by them: that without proper enquiry they dismissed the teacher, &c.," and in a subsequent part says that they are individually liable for the sums awarded. This seems a most material variance between allegation and proof. The pleader very properly deemed it necessary to aver the wilful refusal or neglect to shew a personal liability, and he makes his award shew such *wilful* default: the award in evidence shews nothing of the kind, and leaves the reader at a loss to understand the personal liability thrown on this corporate body.

Even on the narrow issue raised I feel bound to consider

that the plaintiff is entitled to succeed on this last point alone. With the many objections to the whole defence before the court I am not willing to intend anything in favour of this attempt to fix personal liability on persons discharging a public duty and protected by law, except in case of a wilful neglect or refusal. I see no fact or allegation either on the record or in the evidence in my judgment bringing the trustees into personal liability. Had the plea stated the award exactly as it is in evidence the plaintiff would most probably have demurred, and, as I think, successfully. I cannot, therefore, avoid the conclusion that the verdict on the issue should be entered for the plaintiff.

The legislature placed in the hands of school trustees full powers to levy the money required by them to fulfil their engagement with the teachers, and to ensure their proper resort thereto when necessary it is declared that a wilful neglect or refusal to exercise such powers shall involve a personal liability. This seems reasonable. It is not easy, however, to understand how the defendants here propose to bring the trustees under the statutable penalty. Assuming a dispute between trustees and teacher, the latter is dismissed and remains unpaid. He complains and obtains an arbitration. The dismissal is examined into: it is pronounced to have been unwarrantable, and the arbitrators award to the teacher a fixed sum for salary, and an extra sum for twelve days' loss of time. So far all would seem intelligible. The trustees might then be expected to exercise their corporate powers to obtain funds to pay the teacher the sums awarded, and a wilful neglect or refusal so to do would justly subject them to personal liability. But in the case before us the same document that decides the question as to rightfulness or wrongfulness of dismissal, which ascertains in some way or another, that for a service from 11th of March to 23rd of July, or one month and a half of time at the rate of £100 per annum, £50 to be due to the teacher, assumes authority to award that the trustees are "individually liable" to pay, and forthwith directed to pay to the teacher the sums awarded. The award alleged that the trustees did not exercise "all the corporate powers vested in

them by the school acts for the due fulfilment of said contracts or agreement made by them." I cannot believe that facts so found or stated involve a personal liability. Up to the making of the award could the trustees, by any arithmetical process, discover that £50 was due to Naylor for salary? How then can they at once become legally responsible personally to pay that sum (to say nothing of the 12 days' allowance, &c.) forthwith to the teacher? In my judgment the law never meant any thing so unreasonable and illogical. They must exercise their powers to pay their debts, but they must first know what these debts are. The arbitration ascertains them, and creates new liabilities to pay for loss of time to making of award, and several pounds for costs of arbitration. The position of trustees accepting office as members of a corporate body would be one of most seriously increased responsibilities if we hold in the case before us, they became instantly liable to pay these different sums awarded forthwith out of their private means, and their cattle should be subject to seizure before any opportunity was allowed them to exercise their corporate powers.

The plea is I consider open to demurrer, but as the award produced does not even support the very questionable allegation on the record as to "wilful neglect or refusal," I think judgment should pass for the plaintiff on the issue.

As to the 4th plea by Hall, the bailiff, I think it must follow the fate of the first. The same question is raised on the award, and as he has gone to trial on that issue it should be found against him as against his co-defendants.

As to the demurrers—

We have had the advantage of reading the elaborate judgment of the Chief Justice of the Queen's Bench delivered in Trinity Term in a replevin suit brought by the other trustee, Hugh Kennedy, (*Kennedy v. Burness, Hooper, and Dixon*, Q. B. Trinity, 1857), a bailiff, on a second award made for subsequent arrears claimed by Mr. Naylor, in which an attempt was made to enforce the sums mentioned in this award and the after arrears by one seizure.

We fully agree with the conclusions there arrived at. We have two cases in this court besides this, brought against

Burness and Hooper, the second arbitrators, which are almost identical with the case in the Bench.

We agree in thinking the 2nd plea bad on demurrer. Waiving the technical objections to its unusually bald statements, it discloses the fatal want of jurisdiction in the defendants to fix on plaintiff a personal liability. No facts are shewn in that plea to enable the court in any way to understand how the plaintiff's private property became liable to seizure in a dispute between school trustees and teacher.

The 3rd in substance, as I understand it, amounts to a plea of no *months'* notice of action. I consider that the case of Folger v. Minton (10 U. C. Q. B. 423) is decisive against the admissibility of such a defence in an action of replevin. I think the 5th plea by Hall, the bailiff, is substantially disposed of by our judgment on the 2nd plea. The want of jurisdiction is again, I consider, so apparent as to deprive the bailiff of protection as the person named in the warrant. I cannot, on any thing stated in the plea, intend or suppose that the warrant was even *prima facie* legal. It was a proceeding wholly based upon a particular statute, and I consider that any person venturing to seize the personal property of one of the members of a corporation on a proceeding, which he avers in his plea was between "the then school trustees of school sections No. 5, &c., &c., and F. Naylor, the then school teacher of the said school section," should have satisfied himself in some degree that his authority was valid.

As to the 6th plea by the bailiff of want of notice, I consider it disposed of on considering the 3rd plea.

I think the plaintiff entitled to judgment on all the demurrers.

RICHARDS, J., concurred. DRAPER, C. J., not being present when the case was argued, gave no opinion.

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## KENNEDY V. BURNES ET AL.

## MURRAY V. BURNES ET AL.

*Replevin—Arbitration under school acts.*

The principles involved in the judgment in the preceding case of Kennedy v. Hall et al., and in the judgment of the Court of Queen's Bench, in the case of Hugh Kennedy against the same defendants affirmed.

A school teacher, after an award had been made in his favour on a dispute as to salary with the school trustees under the School Acts, afterwards made a claim in a second arbitration for the amount payable under the first award, together with his salary for the further period which had elapsed since such award, and sought under an award obtained *ex parte* and a warrant thereon to recover the amount by a seizure of the trustees' goods. *Held*, on replevin by the trustees, that such a course was illegal and not contemplated by the School Acts.

REPLEVIN for a colt. Writ sued out on the 13th of January, 1857.

Plea by defendants Burness and Hooper ; that plaintiffs, Hugh Kennedy and John Murray, were school trustees of school section No. 5, of the township of Oneida, in the county of Haldimand, and whilst such trustees they engaged one Francis Naylor as teacher in the said school : that differences arose between the teacher and trustees in regard to his salary, the sum due him, and other matters then in dispute between them ; and thereupon, the trustees in the first instance, neglecting and refusing to appoint an arbitrator on their part, and the teacher having appointed one (John Burness) on his part, required them in writing within three days to name their arbitrator to act with the said John Burness, which they not doing, the said Naylor appointed the defendant, Hooper, the second arbitrator ; and the local superintendent chose John W. Sinclair to act on his behalf : that the said arbitrators proceeded with such reference, and after receiving proof, &c., and after Sinclair refused to join in executing the award, the defendants, Burness and Hooper did award to the effect following : " That such school teacher and school trustees had on a former occasion submitted to them their disputes as to such hiring of such school teacher and the amount of his salary in that behalf, and the amount thereof then due, to the award and final determination of one Alexander Scobie, John W. Sinclair, and Duncan Ferguson, or any two of them ; and the said Alexander Scobie and John W. Sinclair, as such arbitrators, awarded in that behalf,

amongst other matters, that the said school teacher was engaged by the said school trustees for the period of nine months from the 11th day of March, A.D., 1856, at a salary of £100 per annum : that such school teacher was improperly dismissed by such school trustees in such behalf, and without being fully paid for his services in that behalf, and in consequence thereof, that such school trustees should pay such school teacher £50 for such arrears, and the further sum of £3 5s. 9d. for salary which had, under and by virtue of the statute in such case made and provided, accrued due by reason of the non-payment of such £50, for the period of twelve days ensuing such dismissal and previous to such award, and the further sum of £6 5s. for the costs and charges of and concerning such award ;" and the said defendants, Burness and Hooper, did further award that the said award was binding and conclusive on such teacher and trustees : that the said arrears of salary of the teacher, and the moneys mentioned in the award were still due and unpaid, and by reason thereof the teacher was entitled to be paid his said salary from the period which elapsed from the making of the said award of Scobie and Sinclair, to the time of the making of the award of defendants, Burness and Hooper, amounting to £37 5s. 4d., which they as arbitrators as aforesaid awarded to be paid by the said trustees to the teacher, together with the costs of this arbitration, amounting to £4 10s.\* of which the trustees had notice; and because they neglected and refused to perform such award of defendants, Burness and Hooper, they issued their warrant to the defendant, Dixon, to enforce the collection of such sums of money\* so awarded by them to be paid as aforesaid, and delivered it to him to be executed ; and in order to enforce the payment of the said moneys mentioned in such warrant, with costs, he levied on the cattle, goods and chattels of plaintiff, doing no unnecessary damage, which are, &c.

Second plea, by Burness and Hooper, as to the grievances in the declaration as far as they relate to them. They say that they (the grievances) relate wholly and solely to their judicial acts transacted while acting in good faith and within their jurisdiction in their judicial capacity of arbitrators duly appointed by virtue of the Common School Acts of

Upper Canada, to award in the matter of a difference then pending between the said trustees and Francis Naylor, the said teacher, in regard to his salary as such teacher, and the sum then due to him in that behalf, and other matters in dispute between them.

Defendant Dixon pleads—

*First*—The same as the other defendants to the asterisk,\* and then proceeds, that such trustees had wilfully neglected to exercise their corporate powers for obtaining the payment of such arrears of salary of such teacher, wherefore the said plaintiffs, William Kennedy and John Murray, who were such trustees, should pay to such school teacher the moneys by the defendants, Burness and Hooper, so awarded to be due to such teacher as aforesaid (as far as the second asterisk,\* and then proceeds), so by them awarded as aforesaid, and by such warrant authorised and commanded defendant Dixon to make such moneys so awarded, by seizure of the goods of the trustees, wherefore he, Dixon, by virtue of the premises, &c., and by direction of the other defendants, in order to enforce payment of the moneys mentioned in the award, with costs, levied on the colt of the plaintiff; which are the grievances, &c.

*Second*, as to such of the grievances as relate to defendant Dixon, he says they relate solely to acts done by him under the statute while acting in good faith and within his jurisdiction, and in his capacity of the person named in the warrant hereafter mentioned, and for the purpose of executing the same, which warrant was then in force and had been issued by defendants, Burness and Hooper, arbitrators duly appointed under the Common School Acts of Upper Canada, to him, Dixon, who was the person named therein to enforce the collection of a sum of £97 10s. 9d., by them within their jurisdiction as such arbitrators awarded to be paid by plaintiff and the other trustees of school section No. 5, in the township of Oneida, in the county of Haldimand, to Naylor, the teacher of the school section, as his salary as teacher, including the costs of arbitration.

The plaintiff takes issue on the first plea of Burness and Hooper and the first plea of Dixon, and demurs to the second plea of the trustees, as also to the second plea of Dixon.

The causes of demurrer were, that defendant shew nothing therein to exempt them from liability in the action : that the character and capacity in which they assume to have acted did not afford any protection or privilege, or constitute any defence such as the pleas set up for them. As to Dixon, the words, "and the jurisdiction assumed by him," after character in which he acted, are inserted.

Issues are joined on the pleas not demurred to in this form ; " and the plaintiff saith, that the said Burness and Hooper did not make the supposed award in the pleas mentioned of and concerning the said matters in difference so referred as aforesaid, *modo et forma*."

#### IN THE SUIT

John Murray	}	The writ in replevin was issued the same day, the action being brought to replevy one mare and two colts, the property of the plaintiff.
v.		
John Burness,		
William Hooper		
and William Dixon,		

All the defendants plead respectively the same pleas as in the case against them by William Kennedy.

In this action in to the first plea of Burness and Hooper, and the first plea of Dixon, issues are simply joined, with demurrers to the other pleas, as in the other suit.

On the trial, before *Gowan*, J., at the last Cayuga assizes, the original award having been lost, a copy was produced and proven. In that copy all that is stated in reference to the former award of Scobie and Sinclair is as follows : " First, having indisputable evidence of a former arbitration, in the matter now under consideration, which was mutually agreed to, and that the terms of the award were recognised by the parties concerned therein, and a promise to pay the sum of £53 16s. 11d. by the said Hugh Kennedy, William Kennedy, and John Murray, to the said Francis Naylor, do deem it unnecessary and unadvisable to examine that matter further, but unanimously agree to adopt the award of the arbitrators."

The award further proved, that finding the trustees have failed to perform the first award, and that the teacher's salary was still unpaid, they agreed that Naylor was entitled to receive his salary from the date of the first to the time of making



the second award, amounting to £37 5s. 4  $\frac{1}{2}$ d., with £4 10s., costs of that arbitration, which several sums amount to £95 12s. 3  $\frac{1}{2}$ d.; and they ordered and determined that the teacher was entitled in all time to come to his salary, so long as the trustees should refuse to pay him his salary as their teacher.

It appeared that there had been a previous arbitration on 4th August, 1856, between the School trustees and Naylor, in which the award was made by Scobie and Sinclair, and by which they awarded to Naylor £50. for salary under the contract, and £3 5s. for twelve days' salary after he was discharged, for which they declared the trustees were individually liable. They further directed that the said sums were due forthwith, and in default of immediate payment to be collected as directed in the Common School Acts. They also found that the trustees did not exercise all the corporate powers vested in them by the school acts for the due fulfilment of said contract or agreement made by them.

The last arbitration was entered into in December, 1856. The trustees having declined to name an arbitrator, Naylor selected one for them. The third arbitrator appointed by the local superintendent, declined joining in the award.

A warrant was issued on 17th of August, 1856, against the goods and chattels of the trustees; and on their goods being seized under it they were replevied, the writ of replevin in William Kennedy's suit having issued on the 1st September.

At the trial, in both suits, it was contended that what was relied on as an award in defendants' plea was bad on the face of it and void, and consequently afforded no defence for the seizure of the property justified under it: that the award was bad in not shewing an agreement in writing, according to the Common School Acts, between the teacher and the school trustees of the section, it having been shewn that such agreement was not in writing: that the award does not shew sufficient on the face of it to make plaintiff individually or personally liable, it not being averred or shewn that the trustees had *wilfully* neglected or refused to exercise the corporate powers vested in them.

The learned judge overruled the objections, but gave plaintiff in each suit leave to move or enter a verdict for

him, if the court should be of opinion he ought to recover. In Easter Term *Start* moved accordingly, and *Martin, R.*, and *Martin, J.*, shewed cause.

RICHARDS, J., delivered the judgment of the court.

In the case of Hugh Kennedy against the same defendants, a very elaborate judgment was pronounced in the Court of Queen's Bench, in Trinity Term last, by the learned Chief Justice of that court, in which he goes over all the points that arise in these two cases. I have had the advantage of perusing that judgment, as well as that of my brother *Hagarty*, in the case of William Kennedy against Hall, Scobie, and Sinclair, which arises out of a seizure of the plaintiff's property on the first award referred to. The whole matter has been so fully discussed in these cases that it is hardly necessary to say more than that we concur generally in the conclusions arrived at in the case in the Court of Queen's Bench, that the verdict should be set aside in each of these cases, and verdicts be entered for the plaintiff in each for 10s. damages.

The award set out in the pleas as the award of Burness and Hooper, in that part of it which relates to the previous award by Scobie and Sinclair, certainly differs from the award itself when produced. If it was necessary to set out the award under which they justify in the way the defendants have done, in order to their defence, then plaintiff might well say that two of the defendants made no such award; or, as he has done in the other case, he might well take issue on the plea which averred that they had so awarded in effect.

The more difficult question for me is, whether the defendants shew a sufficient justification by the other pleas, which set out that what was done was done by them as arbitrators or under their authority, in matters within their jurisdiction under the School Acts. After giving the matter the best consideration I can I do not think these pleas shew sufficient justification, on the grounds suggested and discussed in the judgment of the learned Chief Justice of Upper Canada.

Much of the difficulty in these cases has arisen from the matter not having been brought before the court in a way to raise the points, so that the important question involved

therein could be settled on the merits. The observations, however, contained in the judgments, to which I have referred, seem to me to cover the whole ground on the questions in dispute, and will no doubt settle the law on the subject.

The case of *Aldcock v. Wood* (6 Ex. 814) shews the proper course for the plaintiff to have taken in the cases before us, if the award had been truly set out, was either to have demurred and contended that under the facts therein stated the arbitrators had no power to make the award, or to have moved for judgment *non obstante veredicto*. The issue tendered is, whether there was an award in fact. The ground of objection taken was that there was no power to refer, or if there was a proper reference, yet that the arbitrators exceeded their jurisdiction.

In the cases now under consideration it does appear to me quite unreasonable to suppose that the legislature ever intended that a school teacher, after having had his disputes with the school trustees so far settled as to obtain an award in his favour, which could be enforced by a warrant, should bring another demand against them, not in the shape of a claim that they were personally liable, because they had wilfully refused to exercise their powers, to pay the sum awarded to him, but that they were personally liable to pay all the former award, together with his salary ever since, and this too after the issue of a warrant against the personal property of the trustees to enforce the first award. It is true that the trustees replevied the goods for the purpose of testing the validity of the first award, but that can make no difference as to the rights of the parties.

It seems strange after the legal rights of the parties had, by the first replevin suit, been put in a course of proper settlement, that any one should have been so inconsiderate as to take part, in what must have been a mere *ex parte* arbitration, and then to follow up the award by the harsh course of seizing the trustees' property, when by delaying for a short time the legal rights of the parties would have been settled by a competent legal tribunal.

The judgment of the court is, that the verdict for the defendants in each suit be set aside, and the plaintiff shall be at liberty to enter a verdict for 10s., pursuant to



leave reserved in each suit; and as to the demurrer to the second pleas of the defendants respectively in each suit, judgment for plaintiff, for the reasons stated in the judgment of the Chief Justice of the Court of Queen's Bench, and in that of Mr. Justice *Hagarty*.

HAGARTY, J., concurred: DRAPER, C. J., not having been present when the cases were argued, gave no opinion.

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CAMERON ET AL. V. THE TIMES AND BEACON FIRE  
INSURANCE COMPANY.

*Conditions on policy—Non-performance of.*

Action on a policy of insurance for £500. The case turned upon the 10th condition on the back of the policy, by which the insured is bound within fourteen days to furnish a statement of claim, with proof thereof by affidavit or affirmation when requested.

*Held*, that plaintiffs were bound by the condition endorsed upon the policy, if a proper and *bona fide* demand had been made, but such not being the case the rule was discharged.

WRIT sued out on the 15th of April, 1857.

Plaintiffs declare on a policy of assurance, granted to them by the name and description of John Cameron and Messrs. Cox and McLean, assignees of the estate of William Daneleit by defendant's company, dated the 15th January, 1857, assuring against loss or damage by fire, the sum of £500 on a *stock* consisting of furs, hats, and caps, the property of the plaintiffs as assignees, contained in a building situate in Brantford, with a proviso that the policy and assurance should be subject to the several conditions and regulations therein and thereon expressed, as if they were repeated and incorporated in the policy. The conditions necessary to refer to are the—

5th—Lease-holders, trustees, and all persons entitled to houses, buildings, and other assurable property in the reversion may assure the amount of their respective interest in such buildings and property, provided the nature of the tenure or interest be duly specified. Persons holding goods in trust, or on commission, for the value of which they are responsible in case of fire, may assure the same, but the same must be assured as such, otherwise the policy will not extend to cover such property.

10—All persons sustaining loss are forthwith to give notice



thereof, and within fifteen days after the fire occurring to deliver in writing as particular an inventory of their loss or damage as the nature of the case will admit, such inventory to be in writing signed by the parties, and to contain a list of the articles claimed for, in all cases estimating their worth at the time of the fire, and the parties assured must, *when required*, make proof of such loss by the declaration or affirmation (before the nearest resident magistrate) of themselves, and of their servants, and by *producing their invoices and books of account*, and by all other vouchers as shall be reasonably required, without which no money shall be recoverable.

12—All actions against the company to be commenced within six months after the loss.

The plaintiffs say that at the time of making the policy, and at the time of the loss, they were interested as assignees as aforesaid in the said insured stock, consisting of hats, &c., to the amount of, to wit, £1000, and on the 4th February, 1857, they were burned, destroyed and consumed by fire, whereby plaintiffs sustained damage to the amount of £1000. They aver notice of further insurance with the Monarch Insurance Company, averment of performance of some conditions, and readiness and willingness to perform the others if required.

Pleas, 2—Property not the property of plaintiffs as assignees as aforesaid. .

7th—After the loss defendants requested plaintiffs to deliver to them a particular account of the property thereby lost, accompanying the same with invoices and books of account. But the plaintiffs neglected and refused to deliver such account *with invoices* and books of account, and have not delivered the same.

8th—That a copy of the written parts of the policy was not given in the affidavit of plaintiffs, or their servant, or agent according to the condition of the policy.

9th—That plaintiffs held the said stock in trust for the *creditors* of Daneleit for the value of which they were not responsible in case they were destroyed by fire.

The case was tried at Brantford, before *Burns, J.*, when the defendants objected that the plaintiffs had not made oath of loss as required by the conditions on the policy. The jury

found for plaintiffs. Leave was reserved to move to enter a nonsuit or verdict for defendants on the point raised by the sixth plea.

In easter Term, *O'Reilly*, Q. C., moved on the leave reserved, or for a new trial on the law and evidence, and misdirection.

*M. C. Cameron* shewed cause.

RICHARDS, J.—The material points raised in this case were under the *seventh* and *eighth* pleas. In the former the defendants aver that after the fire *they requested* plaintiff to deliver to them a particular account of the property lost, accompanying the same *with invoices* and books of account, but plaintiffs *neglected* and *refused* to deliver said account *with invoices* and books of account, contrary to the condition in that behalf. In the latter they say that a copy of the written parts of the policy was not given with the affidavit of the plaintiffs, or their servant, or agent, according to the condition in that behalf.

The tenth condition endorsed on the policy amongst other things provides that persons sustaining loss are forthwith to give notice thereof to the company, and within 15 days after the fire, deliver in writing as particular an inventory of their loss of damage as the nature of the case will admit; such inventory to be in writing signed by the parties, and to contain a list of the stock in trade, and goods and other articles claimed for, estimating the worth according to the quality and actual condition and value of the property, at the time of the fire; and the parties assured must, when required, make proof of such loss by the declaration or affirmation (before the nearest resident magistrate) of themselves and of their servants, and by *producing their invoices* and books of account, and by all other vouchers *and shall be reasonably required*, without which no money shall be recoverable. A copy of the written parts of the policy to be given in the *affidavit of the claimant* in all cases.

As to the issue on the eighth plea, it does not appear that the plaintiffs ever required or received the affidavit of the claimants as to the loss, and therefore it would not seem that they were required by the condition to furnish the written parts of the policy, which, by the condition, were to be given in such affidavit.

Judging from the notes of the learned judge and his report of the trial, there appears to have been some unpleasant discussions between the plaintiff's general agent Farrall, and Cameron, one of the plaintiffs ; that they had a quarrel, and while this quarrel was going on Farrall demanded from Cameron the invoices, which Cameron refused to give him, but said Mr. Kerby, the local agent of the company, might see them. The quarrel finally terminated between the defendant's agent being directed by Cameron to leave his office.

The note of the learned judge, as to the demand of the invoices, being the statement made by Farrall, is as follows :

"I demanded from Mr. Cameron for the defendants the invoices of Daneleit. He said he would not give them. Mr. Kerby was with me, and remonstrated with Mr. Cameron about it, saying that the company had a right to the invoices. Cameron then said that he had no objection to shew the invoices to him, Kerby ; that he would not let me have them. On cross-examination he said, between the 5th and 13th of February I had seen Mr. Cameron, and also Cox and McLean several times. Mr. Cameron spoke severely about my taking up Daneleit. Mr. Cameron ordered me out of the office. I had seen the invoices once or twice before the 13th of February. I saw the affidavit of Daneleit on the 13th of February, but whether before or after I demanded the invoices, am not sure."

It does not appear that Mr. Kerby was examined as to the demand of the invoices. This is all that takes place. The plaintiff's do not deliver the invoices, with the contents of which the defendants' agents seem to have been acquainted ; and they lie by until they plead on the 2nd of May, when they set up this omission as a defence, and urge it at the trial. If they really wished these invoices, they could have written to plaintiff and required them, and if they had been refused after that, it might have been properly said that they had neglected, or refused, to make proof of their loss by producing their invoices, &c., "after having been requested so to do, the same then being a *reasonable request*."

I take it for granted, from the matter in which the



case was left to the jury, that it was a matter fairly open from what occurred at the trial, for the jury to say whether the demand by defendant's agent of the invoices was made at all, or if made, was *bona fide*, or whether it was not made under such circumstances as to induce them to suppose it was made for mere purpose of annoyance, and not "*a reasonable request*" to obtain information; and that plaintiff refused because, at the time and under the circumstances under which the demand was made, it was unreasonable. The note of the learned judge as to the manner in which this issue was left to the jury is as follows.

"Under the 7th plea is it true that the invoices were demanded and refused? The 6th condition shews that the defendants had a right to have such invoices, &c., as shall be reasonably required. There was nothing unreasonable in the defendant asking the production of the invoices the parties had, and production must mean leaving the invoices with the parties a reasonable time so that defendants can have an opportunity of examining them. If it be true that these were demanded and refused, the plaintiffs have forfeited their right to sue on this policy."

The jury found a general verdict for plaintiffs, and I understand the judge who tried the cause is not dissatisfied with the finding on this point.

As to the merits, that of course was for the jury. They heard all the evidence, and the principal witness having been  $3\frac{1}{2}$  hours under cross-examination, they nevertheless on consideration of all the facts found for plaintiffs. If the verdict had been the other way we would not have disturbed it.

We think the well-settled practice is not to submit a case of this kind to a second jury on the same evidence, when the matter has been decided, after full deliberation, by the first jury. It would be almost like trying a man a second time for felony on the same evidence after he had once been acquitted.

On the whole we are of opinion that the rule for a new trial in this case must be discharged.

Rule discharged.

HAGARTY. J., concurred. DRAPER, C. J., not being present at the argument, gave no opinion.



## MICHAELMAS TERM, 21 VICTORIA.

Present—The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

“ WILLIAM BUELL RICHARDS, J.

“ JOHN HAWKINS HAGARTY, J.

## THE QUEEN v. THOMAS CRAIG.

*Forgery—Motion for a new trial under 20 Vic., ch. 61.*

The prisoner was indicted for forgery. The facts appearing in evidence being that a promissory note had been drawn by himself, payable *two* months after date to the order of one T. S., and afterwards indorsed by said S., the prisoner then altered the note from two to three months, and discounted it at the Bank of B. N. A., in London, C. W.: upon this fact the jury convicted him of forgery. The motion for a new trial was made under statute 20 Vic., ch. 61, on the ground that the forgery or uttering, if any, was a forgery of, or the uttering of a forged *indorsement*, (the note having been made by himself) and that there was no legal evidence of an intent to defraud.

*Held*, that by altering the note while in his own possession after it was indorsed, it was a forgery of a note, and not of an indorsement; and 2ndly, that the passing of the note to the third party, who was thereby defrauded, was sufficient evidence of an intent to defraud.

*D. G. Miller* applied for a rule *nisi* for a new trial in this case, under the statute of last session, 20 Vic., ch. 61, which permits any person convicted of felony to apply for a new trial to either of the Superior Courts of Common Law, if the conviction has taken place before a judge of either of such courts, “upon any point of law or question of fact in as full and ample a manner as any person may now apply to such Superior Court for a new trial in a civil action.

The prisoner was convicted at the last court of Oyer and Terminer and general gaol delivery, held at London, before *McLean, J.*

The indictment contained six counts. The first was for forging a promissory note for payment of £150. The second, for forging the signature and endorsement of Thomas Scatcherd, on a promissory note for £150. The third for having altered a promissory note made by himself for payment of £150, to Thomas Scatcherd, at two months from date,

and endorsed by Thomas Scatterd, after such endorsement, and without the consent of Thomas Scatterd, so as to make it payable at three months from date. The fourth, for offering and putting off a forged promissory note for £150. The fifth, for offering and putting off a forged indorsement of Thomas Scatterd, on a promissory note for £150. The sixth, stating the alteration as in the third count, for putting off and disposing of the altered promissory note.

The note was as follows: "£150. London, C.W., March 24, 1857. Three months after date for value received, I promise to pay to Thomas Scatterd, Esq., or order, at the Bank of British North America, in London, Canada West, the sum of one hundred and fifty pounds, Thomas Craig." Endorsed "Thomas Scatterd." The evidence shewed that Mr. Scatterd had been in the habit of endorsing notes for the prisoner's accommodation, and had endorsed this note, payable at *two*, not *three* months after date, to renew, as he thought, another note previously endorsed by him. That the prisoner after Scatterd's endorsement, and without any communication with him on the subject, altered the word *two* to *three*, and then discounted it. After it fell due Scatterd was sued upon it, and defended the action on the ground of the alteration, which being proved the plaintiffs were nonsuited. The jury convicted the prisoner on the fourth count, acquitting him on all the others.

The grounds on which the rule was moved were, 1st. That the learned judge misdirected the jury in telling them, that the evidence of altering the note after it had been endorsed by Scatterd, so as to make it payable a month later, was sufficient to sustain the allegation of an intent to defraud. 2nd. That the verdict was against evidence, because the forgery or uttering, if any, was a forgery of or the uttering of a forged *endorsement*, for that there could be no forgery by the prisoner by altering a note made by himself, while it remained in his own hands, and for his own benefit, and therefore it was the effect on the endorser's liability which made it a forgery, and so it should have been treated as a forged endorsement. 3rd. That the verdict

was against law, for there was no legal evidence of an intent to defraud, nor any legal offence disclosed by the evidence, or at all events on the fourth count.

DRAPER, C. J., delivered the judgment of the court.

Considering the importance and novelty of the principle and practice introduced into the administration of the criminal law by this statute, we thought it better to consider carefully whether we should grant a rule *nisi* in this case, which we think should not be done unless, after an examination of the evidence given at the trial, and of the grounds of the application, we saw some apparent reason for inducing us to doubt the propriety of the conviction; for it is to be remembered that this act carefully preserves the former statute 14 & 15 Vic., ch. 13, inviolate, and that the present case is one in which the learned judge before whom the prisoner was convicted, did not feel it necessary to reserve any question of law which arose at the trial for the consideration of either of the superior courts.

And as this authority is vested in the judge presiding at any criminal trial, it is the more necessary that his attention should be drawn to every matter of law which is relied on for the prisoner, whether by way of suggestion on the defence, or of exception to the judge's ruling or direction, at the trial; and it adds, in cases of this character, additional weight to the objection which is upheld by authority in civil cases, to permitting an exception on the ground of misdirection to be taken on a motion for new trial, which exception was not taken at the trial. We should consider the absence of any objection of this character during the trial, very difficult, if not impossible to be got over. It is however, so far fortunate that the exception to the direction taken by this motion is involved in a more general objection to the sufficiency of the evidence to warrant or uphold the finding of the jury.

Taking the two last grounds stated in the motion into consideration, I have arrived at the conclusion that they are quite untenable.

No doubt a man may draw a promissory note for any sum that he pleases, and in favour of any person, and payable to

him, or to his order, or to bearer, and on demand, or at any time after date at any place, and so long as it remains simply as *his own* promissory note in his own possession, and charging no other person but himself with liability, he may alter it at his own free will in all or any of these particulars.

But that right of alteration ceases when another person becomes interested in the note, either by acquiring it as his own property, or by becoming a party to, or responsible for, its payment, and an alteration then made, prejudicial to any such person, and under circumstances which afford ground for inferring an intention to defraud, is a criminal act.

In the present case the prisoner made his promissory note in favour of Thomas Scatterd, payable at two months after date, and he procured Scatterd to endorse it for his (the prisoner's) own accommodation. It then remained in his own hands until he discounted and obtained the proceeds for his own use. It might be conceded, for the sake of argument, that if the prisoner had made the alteration proved of substituting "three" for "two," and had retained the note in his own hands, that he could never have been convicted of forgery, because it might have been considered there was nothing to establish the intention to defraud, and so far, perhaps, Mr. *Miller's* proposition would have been tenable, that retaining the note in his own hands, he might alter it without incurring criminal responsibility.

But the present case is different. That the alteration changed the liability of the endorser materially, cannot be doubted. He would be made a surety for the prisoner for a longer period before the note would become due. If it had remained as it was when he endorsed it, it must have been passed away in a proper course of dealing within the two months, or he could have raised the defence against a party who took it, after it fell due, from the prisoner, that he was a mere accommodation endorser, or he might have been willing to take the risk that the prisoner would pay it at the expiration of two months; or might have had some means of protecting himself from loss if called upon *then*. But receiving no notice of non payment *then*, he might conclude the note was paid, and so lose the opportunity before the additional



month expired. There can be no ground whatever to doubt that such an alteration is a forgery. It is true, it postpones instead of anticipating the time of payment, but the effect on the endorser is clearly a prolonging, and thereby increasing his liability—at least the prolongation may have that effect, and that is sufficient.

Then, as to the argument, that this alteration, if forgery at all, is a forgery of the endorsement, and not of the note, I cannot say I feel any doubt that it is a fallacy. The endorsement is unaltered—it is genuine—and would have continued to be valid and binding, as long as the note on which it was made remained the same. But the moment the note was altered in a material point, it ceased to be that which Scatcherd had endorsed, and being uttered in the altered state as a note endorsed by him, when it was not the note endorsed by him, such uttering was the uttering of a *note altered* so as to constitute forgery—a forgery of a note at three months, endorsed by Scatcherd—and not a forgery of Scatcherd's endorsement on a genuine note at three months. The apparent difficulty arises from not considering that Scatcherd's endorsement, creating a liability on the note as originally drawn, deprived the prisoner of the right he possessed before such endorsement of altering the note in any manner he pleased. The argument is, that because the note was his own property, made by himself, and until issued and disposed of by him, of no value to any body, he might do what he pleased with it as regarded his own liability, though he had no right to change the liability of his endorser; and that the alteration of the *note* affected only himself, but the effect on the endorser, was by its operating to change a true endorsement of a note at two, into a forged endorsement of a note at three months. In a technical view, the note, when issued to a third party for value, would be deemed as representing a debt due by the prisoner to Scatcherd, and by him endorsed and transferred to such third party, and then the alteration of the note would be a fraud on Scatcherd the payee, and could never be treated as an alteration of the endorsement. If the note had not been an accommodation note, such would have been the exact character of the trans-

action; for the prisoner, having made a note to Scatterd for value, payable at two months, who had endorsed it for value to a third party, would, by afterwards changing it, as he has done, commit forgery, and it is clear that in such case it would be a forgery of the note. I see no reason for holding differently under the circumstances as they appear.

As to the intention to defraud, in point of form the indictment is sufficient under 18 Vic., ch. 92, sec. 10, without naming any particular person; and though there must be evidence of an intent to defraud some person, or the conviction could not be upheld, yet the facts were ample to warrant the conclusion that either Scatterd, or the party who became the holder of the note, might be defrauded, and that is enough, *Regina v. Hodgson* (2 Jur. N. S. 453). In fact the endorsee was defrauded, for he sued Scatterd and failed in his action. It is no answer to this, that the prisoner may have intended and fully expected to have paid this note at the expiration of three months. Such an answer might be urged, and perhaps quite truly, in cases where the forgery was of the name of another known party, or by using an assumed name. There is little reason to doubt that parties may, when hard pushed for money, which they confidently expect to be able to pay after some short interval, overlook the real character of the acts they commit to gain time, but we must judge of such acts by their real character, and not by the expectations under which the parties committed them; and if, as in the present case, everything concurs which the legislature have pointed out as constituting the true definition of crime, we must so treat it, and not qualify it, by introducing other considerations than those which the statutes express. The question is, moreover, for the jury, and they have decided it upon evidence properly left to them, and legally sufficient.

In disposing of this application, we have not felt bound to determine whether there may not be found a necessity for formally bringing the indictment as well as the report of the learned judge who tried the prisoner, into this court, before entertaining the application; nor whether the third clause of the statute, in which the power and duty of

the superior courts upon such an application is defined, taken in connection with the first section, contemplates a rule *nisi* to be answered on behalf of the Crown. There is a power given by the 6th section of the act, to the judges of the superior courts of common law, to make rules and orders for effectually carrying out its provisions.

I have looked at the case of *Regina v. John Danger* (3 Jur. N. S. 1011) referred to by Mr. *Miller*, but it really has no bearing whatever on the question presented to us. It is more like the case of the *Queen v. Autey* (3 Jur. N. S. 697), which, though not in point, confirms the view I adopt.

Had we felt it our duty to grant a new trial in this case, we must also have considered whether we must have limited it to a new trial on the count on which the prisoner was convicted, or whether the new trial should have been also on the counts which the jury pronounced a verdict of acquittal. The statute confines the right of applying for a new trial to the prisoner. It would be a singular and not very satisfactory result, if a verdict of guilty should be inadvertently entered on a count which a more careful examination shewed was not supported by the evidence, while a verdict of acquittal was rendered on other counts which were sufficiently well proved, that the prisoner should be relieved from all further peril on those counts, and by getting a new trial on the count which was not sustained in proof, should obtain his discharge altogether.

We are of opinion the conviction should be affirmed.

*Per Cur.*—Conviction affirmed.

The Chief Justice referred to *Regina v. Cook*, 8 C. & B. 582; *Regina v. Marcus*, 2 C. & K. 356; *Regina v. Wilson*, 2 C. & K. 527; *Regina v. Wicks*, R. & R. 149; *Regina v. Atkinson*, 7 C. & P. 669; *Regina v. Post*, R. & R. 101; *Regina v. Treble*, R. & R. 164; *Regina v. Horwell*, 6 C. & P. 148.

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## O'BRIEN v. MUNICIPAL COUNCIL OF TRENTON.

*Surveyor's act, 12 Vic., ch. 34—Dedication of highway*

On the trial of the question whether a certain street ought to be continued south of a certain point to the water's edge as a public highway through land of the plaintiff, who was admitted to be owner of the land on both sides, the main evidence in support of such claim was a map, alleged to be the original map by which the village was laid out forty years ago; shewing apparently such continuation, but not authenticated by any signature or date, and for upwards of twenty years before suit another plan, duly registered, had been in general use, and no user was proved for the purpose of a highway. The court held that they were not bound by the 41st section of the above act to declare the street so marked to be a public highway.

This is an action of trespass to plaintiff's close in the village of Trenton, abutting on or south, north shore of the bay of Quinte; on the east, or the west side of the River Trent; on the north, or the south side of Dundas Street; and on the west, in a line drawn parallel and in continuation of west side of Front Street in said village, as now established produced to said bay shore.

*Pleas*—1st. Not guilty. 2nd. That the *locus in quo* is a public highway, and as plaintiff was obstructing it by his fence the defendants opened it. Replication, issue on 1st plea and to 2nd traverse, that the *locus in quo* was a public highway.

The case was tried at the Belleville spring assizes, before *Hagarty, J.*, and a verdict was rendered for plaintiff for one shilling damages, subject to opinion of the court by whom a verdict might be entered for defendant, or nonsuit on the evidence, with liberty to draw inferences, &c.

The point in contest was whether Front Street, which now runs north from Dundas Street, at right angles, should or should not be continued south of Dundas Street across the land of plaintiff to the bay shore. The defendants admitted that they could shew no dedication or user beyond the legal effect of certain deeds produced, and a plan said to be the original plan of the village, made by one Greely.

The following state of facts appeared:—Patent to John Bleckie, the 1st of March, 1805, of seventeen acres, including all the land in question.

John Bleckie, son of patentee, swore that this land was surveyed by one Greely nearly forty years ago; that in



running Front Street north, he commenced on Dundas Street and did not go south of it; that there were no posts south of it; and that he, witness, assisted at the survey. (The village now called Trenton appears to have been formerly known as the "River Trent.") Witness had seen Greely's plan; does not think it went down to the water's edge; did not pay much attention to it; it was never intended to lay out a street south of Dundas Street; never heard of this street till this dispute. George Bleckie swore the same effect.

On the 10th of March, 1821, John Bleckie conveyed in fee to Henry Ripson, a moiety in thirty acres; commencing on the bay between 1 and 2, reserving building lots 2, 3, 5, 10, and part of lot 1, containing together two acres, three roods, two perches, *as described by Greely's map or plan of village lots.*

The same description is given in a deed from Ripson to Harris, the 31st of January, 1824, and in a deed from Harris to Murphy, the 23rd of August, 1825.

By deed, dated the 3rd of January, 1822, John and George Bleckie conveyed to Jacob W. Meyers certain village lots, with a description. "*Beginning at the Bay of Quinte, south-westerly side of Front Street, thence along the same north 48°, west 1 chain; then south 42°, west 1 chain; then south 48°, east 1 chain, 15 links, to the bay aforesaid; then along the same north-east to the place of beginning.* And by deed, dated the 20th of June, 1832, J. W. Meyer sold the same land by the same description to W. Robertson.

By deed, dated the 12th of August, 1825, George Bleckie conveyed his moiety in thirty-four acres to John V. Murphy, without reference to any plan or street; and by deed, dated the 30th of January, 1829, Murphy conveyed to Wm. Robertson a portion of said land. It is admitted that there are several deeds, and all the land in question on both sides of the street claimed, and including the street, has become vested in plaintiff.

These deeds are only referred to as to the peculiar wording of the descriptions, and to prove title, as it was admitted that plaintiff was by various conveyances seized in fee of the

road claimed by the municipality, and the land on each side from Dundas street south to the bay.

The plaintiff insisted that whatever might have originally been marked on Greely's plan, or described in the early transfers, no road in fact had ever been opened or used by the public ; that many years before the Surveyors' Act of 1839, the title for the whole of the land south of Dundas Street, through which the road is now claimed, had become united in one person.

The defendants called Mr. Benson, who produced a plan from among the papers of his deceased brother, who had been solicitor to Mr. Robertson, the owner at one time of the premises in question, and of other property at Trenton. He said he had it four or five years. It had been used at Cobourg, at the trial of an ejectment, *Doe Murphy v. Maguire*, which Robertson defended as landlord, defendant being his tenant ; Robertson had brought this plan to Benson's office.

Jacob Ford swore he had seen the plan before ; it was the original plan of the village. In 1825-6, he went to J. W. Meyers for a description of a lot, and he gave witness this plan. It was thus known in Greely's plan ; witness had it many years ; he understood it to be the first plan of Trenton, by which that part of the town was laid out : witness had done conveyancing for many parties at Trenton, and his attention had been drawn to the boundaries of lots. By this plan Front Street goes to the water. If cut off below Dundas Street access from the bay would be difficult. Witness had drawn a deed by Greely's plan. In 1830 witness lent the plan to Robertson, and never could get it back. Thinks he saw it, when a witness at the trial at Cobourg, used by Robinson : search had been made for it : cannot say that his attention was particularly drawn to it at that trial.

A. H. Meyers swore that he had seen this plan of Greely's, being that now produced : it is recognized as the original plan of Trenton : was counsel for plaintiff in *Doe Murphy v. Maguire* : say this plan then produced by defendants : had seen it many years before ; it was in possession of parties adverse to witness, and did not see it again till this trial. It

was handed back by order of the court to Robertson or Benson: witness then called the attention of one Peterson, a surveyor, and Mr. Ford, to the plan, wishing them to observe that Front Street ran straight through to the bay. Witness owned a grocery store on the west side of Front Street, north of Dundas Street. By Greely's plan the street was only 33 feet wide; people gave seven feet more to widen it; this was done gradually. In early times witness often saw this plan: Rubridge's plan was in 1834.

Mr. Ford swore, that from 1834 people would naturally refer to Rubridge's plan, made by the principal owner of the place; it is a registered plan.

This plan bears the name of no surveyor, or date. It is endorsed "Old plan of River Trent," and marked "Doe Murphy v. Maguire et al., filed 30th April, 1852, L. Heyden, C. A." It is an old document much worn. It shews the River Trent and a number of lots marked out along the stream, with lines resembling streets intersecting them: no writing whatever except "Bay of Quinte," and "River Trent," and a scale and certain courses. Some numbers in figures are marked on the lots in ink that certainly look much fresher than that of the rest of the plan. No name of village or of any street marked is given by this plan: the witnesses say that Front Street is continued to the water south of Dundas Street. The street they point to as being Front Street is no doubt so marked. This plan never was registered.

In Easter Term the case was argued by *Jellett* for plaintiff, and by *Walbridge*, Q. C., for defendants.

The Surveyor's Act 12 Vic., ch. 35, sec. 41. *Bateman v. Bluck*, 27 L. J. 406, Q. B.; *Onley v. Gardiner*, 4 M. & W. 496; *Clayton v. Corby*, 2 Q. B. 813 were cited.

HAGARTY, J., delivered the judgment of the court.

The defendants chiefly relied on the Surveyors' Act; the 41st section declares, that whereas "Many towns and villages in Upper Canada have been surveyed and laid out by companies and individuals, and by different owners of the lands comprising the same, and lands have been sold therein according

to the surveys and plans thereof, it was enacted that all allowances for road, street or streets, common or commons, which have been surveyed in such towns or villages in Upper Canada, and laid down in the plans thereon, and upon which lots of land fronting on or adjoining such allowances for road, street or streets, common or commons, have been sold to purchasers; shall be, and the same are hereby declared to be public highways, streets, and commons, &c. &c. Provided always, that any owner or owners of any such towns or villages, or the owner or owners of any original division thereof, shall have lawful right to amend or alter the first survey and plan of any such town or village, or any original particular division thereof, provided no lots of land have been sold, fronting on or adjoining and street or streets, common or commons, where such alteration is required to be made."

In a case clearly coming within the words of this enactment, we would of course have no alternative but to decide without regard either to lapse of time or great personal hardship or inconvenience. We are here called upon to sanction the opening of a highway through plaintiff's land on evidence by no means definite or satisfactory.

Forty years ago, it is alleged, that by the plan known as Greely's, this road called Front Street was marked out north of Dundas Street, it was opened and used according to the plan. Between that street and the water it is said by one witness, that no posts were planted although the line of the street is defined. The family of the then owners, so far as their views can be gathered from Mr. John Bleckie's evidence, apparently did nothing indicating an intention to open the street, and knew nothing, or at least heard nothing of its being claimed as a highway till the present claim. Greely's plan is spoken of in a conveyance from one of the Bleckies in 1821, and the same description is used in 1824. In 1822 the same family conveyed to J. W. Meyers a piece of land evidently abutting on this street as continued to the water's edge, and the same description is contained in a deed made in 1832, from Meyers to Robertson.

Mr. Robertson, for some years before this, had been a land-



holder in the village, and about 1830 he obtained this plan from Mr. Ford, and from that time seemed to desire its suppression. After the conveyance to himself, in 1832, from Meyers, when the old description in Meyer's deed of 1822 was used, we have no trace of Greely's plan having been either used or alluded to till its production at the Cobourg assizes in 1852. About the year 1834, a new plan of the village, called Rubridge's plan, was made, not shewing this street south of Dundas Street. This plan was registered, and appears from Mr. Ford's evidence to have been since generally used and referred to.

It appears to us on the fullest consideration, that this is not a case in which the language of the Surveyors' Act of 1849 should compel us to declare the street marked in Greely's plan, to be a public highway. Over thirty years have elapsed since (with the exception of the deed to Robertson in 1832) we find this plan or street alluded to, and for more than twenty years before the commencement of this suit another plan duly registered seems to have been by general use and acceptance adopted in the transfers of property in Trenton.

The plea sought now to be revived does not come to us established or recommended by evidence satisfactory to our minds, for the opening of a road, admitted never to have been heretofore opened or used, and depending on the tracing of this piece of paper, forty years old. No signature attests its accuracy—no date is given—not even the name of the village or the streets, now contended to be thereby unalterably established. Every thing depends on the recollection of old inhabitants to establish its genuineness, or to identify the premises traced on its face, and one witness deposes that along the way sought to be now opened no posts were in fact placed; and for nearly a quarter of a century the lands on each side of this alleged street and the soil thereof have become united in the hands of one owner, during all that long time, and until this suit, unchallenged by the public or any private claimant.

It would be most dangerous, in our judgment, on such testimony as this case offers, to decide that at any distance

of time, and any continuance of non-claims or non-uses, to declare that a public highway shall be carried through any man's freehold or dwelling house.

The statute, designed by the legislature to be a public benefit, might otherwise in a multitude of cases be the occasion of extreme injustice.

The Chief Justice of this court heard the argument of counsel on the first motion for a new trial, and although not having the advantage of being present at the second argument, fully concurs in the judgment now pronounced.

Postea to plaintiff.

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### SANDERS v. BABY.

*Agreement under seal—Parol discharged.*

Action to recover back the purchase money paid by plaintiff for two years, profits of certain mining shares under a sealed agreement on the allegation that before the two years had expired the defendant had sold the shares, and that the consideration had failed. Plea, that such shares had become valueless and unproductive of profit, and that the act of selling was in fact at the plaintiff's parol request, and for his benefit.

*Held* good on demurrer, the action not resting on any direct breach in the sealed agreement.

This is a demurrer to a plea to 2nd count.

The count states by sealed agreement between parties, that defendant agreed to sell to plaintiff and plaintiff agreed to buy of defendant all the net profits which should arise during two years from and out of certain 1,500 shares capital of the Lake Huron and St. Mary's Mining Company, then the property of defendant, for £375 then paid. That defendant, before the expiration of two years, not regarding the agreement, sold the shares and parted with his property therein, and thereby hindered and prevented the plaintiff from recovering the profits so sold to him, and the consideration of the agreement wholly failed, whereby an action hath accrued to plaintiff to demand, &c., the said £375 from defendant as paid for the consideration of said agreement, and interest, which said money and interest making together the sum of £750, as other parcel of the moneys before demanded.

The plea avers, that after said sale to plaintiff and before

the conveyance of the shares as in the count mentioned, the whole stock of the company without defendant's default, became wholly valueless and unproductive of profits, so that the holders became convinced that no profits could arise therefrom within two years, or at any time, and while said stock was so valueless an arrangement was agreed on, without defendant's privity, by plaintiff and others on the part of the said company with other parties representing the Montreal Mining Company, to transfer the stock of the former company to the last named company on advantageous terms to the stockholders of the first company, which arrangement could not be completed without the assent of defendant, and a conveyance of his shares. That plaintiff well knew that no profits could arise from the stock, and being desirous of completing the arrangement in order to secure its advantages to himself in respect to a large number of shares which he held in the original company, requested defendant to accept the arrangement, and in accordance therewith to convey his shares to the Montreal Mining Company, and defendant, by reason of plaintiff's request, and with his consent, assented to the arrangement, and in accordance therewith conveyed his paid shares to the Montreal Mining Company, as in the second count mentioned.

To this plea plaintiff demurs, as setting up a parol agreement as affecting a release from performance of a sealed agreement, or as affecting a rescinding thereof, or as relying on a verbal request to commit the breach, or as a license to commit the breach.

During this term *A. Prince* for the demurrer was heard, citing *Bird v. Smith*, 12 Q. B. 786; *West v. Blakeway*, 2 M. & G. 729.

*O'Connor* supported the plea.

HAGARTY, J., delivered the judgment of the court.

Judging merely from the conclusions of the counts, we suppose this to be intended as an action of debt on the agreement.

We were pressed on the argument with the well-established doctrine that a breach of a sealed agreement cannot be excused by the parol licence of plaintiff, nor recinded by a parol

agreement before breach. We do not consider this case within the rule of law which was fully considered by this court in the recent case of *Gaskin v. Counter*, 6 C. P., 99,

If this provided that defendant should hold these shares and not part with his property therein, or for the payment back of the purchase money, £375, if he violated the agreement, the plaintiff's objections to the plea might be fatal. But as we understand the contract, it was a purchase of two years' profits on certain shares, and plaintiff's right to make anything of his bargain must be contingent on the fact of their being any such profits. If no profits, then he would be entitled to receive nothing. His complaint here is, that defendant conveyed away the shares, and thereby hindered him from receiving the profits so sold to him. He does not aver that there were in fact any profits, or shew how the sale by defendant damaged him in any way, nor do we see on what he grounds his claim at the end of his count to demand back the £375. The claim, if any, seems to us to be naturally for such damages as plaintiff could shew he has sustained, not for any specific sum as a debt or liquidated amount.

The defence set up does not seem to us as an answer of matter of parol defence to an express covenant or speciality. Had defendant never parted with the shares, it would be a good defence to an action for profits that there were no such profits. Here the claim seems rested on the mere averment that defendant had sold the shares; not that there were any profits in fact which plaintiff should get. The plea says substantially, there never were any profits, and my act of selling was at your special request and for your benefit, you well knowing that no profits ever had been made or would be made out of them. These statements of defendant, admitted by plaintiff to be true, certainly ought to be a good defence, and we have come to the conclusion that they are sufficient. The plaintiff's mistake appears to be in treating the sale of the shares as necessarily a direct breach of sealed agreements; the same in fact as the not paying the plaintiff profits thereon averred to have accrued.

The distinction is well illustrated by the arguments and judgment in *Rawlinson v. Clarke* (14 M. & W. 187). In



Spence v. Healey (8 Ex. 668), it was a plea of accord and satisfaction before breach of covenant to pay a sum certain.

In argument, Blake's case, 9 Rep. 44 *a* is cited. "There is a difference when a duty accrues by the deed in certainty *tempore confectionis scripti*, as by covenant, bill or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing, and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty. But when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages, which are only in the personalty for such wrong or default accord with satisfaction is a good plea." *Parke, B.*, said, wherever, damages only are sought to be recovered such a plea affords a good answer; but when the covenant is for payment of a sum certain, the covenantee has a right to object that the discharge is not by deed.

Although an exception is taken to the count, and it formally demands the whole sum as a debt certain, we think we must look at the true nature of the claim on the facts set forth.

We think the defendant should have judgment.

Judgment for defendant.

## EX PARTE HAYES V. THE CITY OF TORONTO.

### *By-law—Application to quash.*

This was a by-law passed to raise a loan of money for the construction of an esplanade under 20 Vic., ch. 80, which authorises the city to *raise a loan for such an amount, not exceeding £75,000, as may be necessary, &c.* The by-law passed thereunder held bad, and quashed upon the ground that while it authorised the raising of a loan to the full extent of £75,000, it did not shew that that sum was necessary, nor does it shew for what amount the contractors had engaged to do the work.

*Hallinan* in Michaelmas term moved to quash a by-law of the City of Toronto, passed on the 12th of October, 1857, entitled, "An act for the purpose of raising £75,000 by debentures for the purpose of filling up the water lots."

The by-law, after partially reciting the statutes 16 Vic., ch. 219, and 20 Vic., ch. 80, and that the mayor &c.,

of the city had contracted with Messrs Humphrey, Camp, & Co., for filling, levelling and grading, a certain space in front of the City; and that Humphrey, Camp, & Co. are proceeding with the work; and that the annual value of the whole rateable property of the City for the year 1856 was £437, 931; and that the annual rate in the pound required as a special rate for the payment of the interest, and the creation of a sinking fund for the payment of a loan of £75,000, is three pence in the pound. Enacted 1st—That the mayor may raise by way of loan at a rate of interest not exceeding six per cent. per annum from any person, &c., on the credit of the debentures and special rate, a sum not exceeding in the whole the sum of £75,000 H. currency, and cause the same to be paid into the hands of the Chamberlain, to be applied by him from time to time under the direction of the Common Council, in defraying the expense of filling in, &c. 2nd—That the mayor may cause any number of debentures to be made out, not less than £100 each, and not exceeding in the whole £75,000, to be under the common seal and signed by the mayor and chamberlain. 3rd—That the interest shall be payable half-yearly; and the principal sum of £75,000 shall be made payable at the end of twenty years. 4th.—That a special rate of three pence in the pound be imposed upon the assessed value of all the rateable property in the city and liberties, over and above all other rates, from the year 1858 to the year 1877, both years inclusive, for the purpose of paying the said sum of £75,000, with the interest. 5th—That the money arising from the rate of three pence in the pound, after payment of the interest on the loan, shall be invested by the Chamberlain in each year in government debentures, or in other provincial securities.

He filed an affidavit of Michael Hayes, stating that he was a resident householder and ratepayer, and has an interest in the operation of the by-law; and an affidavit of his own, that he is a householder and rate-payer, and resident in the city, and has been assessed on property in the city, and has a direct interest in the operation of the by-law, and verifying the copy of the by-law produced as that received

by him from the clerk of the municipality ; as being duly certified by the said clerk, and having the city seal attached thereto.

The 20 Vic., ch., 80, was passed to alter and amend the provisions of the 16 Vic., ch. 219, respecting the construction of an esplanade, and for other purposes. The third section enacts that notwithstanding any act, &c., it shall be lawful for the mayor, aldermen, and commonalty of the city of Toronto, forthwith and without further notice, to pass a by-law to raise a loan for such an amount not exceeding £75,000, as may be necessary, for the purpose of filling in, grading, and levelling the space between the north line of the esplanade, and the shore of the bay, and the extensions thereof in the act mentioned, and to issue debentures ; and for the purpose of redeeming the same, and paying the interest thereof, a special rate may be imposed as provided in the act hereinbefore mentioned, and shall be applied in payment of interest and in forming a sinking fund for principal, in like manner as therein provided. The second section of 16 Vic., ch. 219, authorised a by-law for such an amount, not exceeding £120,000 as might be necessary for the purpose of constructing the esplanade, and to issue debentures payable in 20 years, and to impose a special rate per annum to be called the esplanade rate, over and above all other rates, which shall be sufficient to form a sinking fund of two per cent. per annum, and the interest on such debentures, which sinking fund shall be invested in each year either in the debentures provided for by the act, or in government debentures, or other provincial securities.

The objections taken to the by-law were, that it did not distinctly specify what sum was to be raised, the language being, "a sum not exceeding in the whole £75,000," and that it is not shewn what sum was necessary for the purposes authorised by the act of parliament, nor for what sum Humphrey, Camp & Co., had contracted to do the work. That the cost of the work might not exceed half the sum which the mayor, &c., was authorised to raise by the by-law.

A. Wilson, Q. C., in the same term shewed cause. He said the substantial objection was, that the by-law shewed no authority to raise £75,000.

Every intendment will be made to support the by-law even to an intendment that £75,000 was necessary, and for that reason authority to raise £75,000 was given ; and that all necessary preliminary enquiries and calculations had been made before the by-law was passed. The applicant had filed no affidavit, calling in question the necessity for so large a sum.

That the by-law is not uncertain as to what amount is to be raised. Reading it altogether, with the special rate, and the annual value of rateable property, it appears that it was intended to raise £75,000. The preamble also recites it ; and the third section as to payment of interest, and of the principal sum of £75,000, is specific, and so is the fourth section imposing the special rate for the payment of the interest, and of “ the said sum of £75,000.”

That the words, “ not exceeding,” &c., had received an interpretation of *Cortis v. Kent Waterworks Company*, 7 B. & C. 314, which went further than was necessary to support this by-law.

That the courts will not interfere, where there has been delay unless it is obligatory.

That the affidavits as to being interested, departed from the statute, 12 Vic., ch. 81. sec. 155, which authorised any party having an interest in the “ provisions ” of a by-law to move against it, whereas these affidavits only stated the deponents were interested in the “ operation ” of the by-law. That Hayes, who is the applicant, does not swear *he* obtained the copy of the by-law, and that *Hallinan*, who swears he did obtain it, is not sworn to be attorney for Hayes, and the 155th section only authorises the party interested to apply, by *himself or his attorney*, to the clerk of the municipality for a copy of the by-law. Even if the court think it a *doubtful* question, they may withhold their condemnation of the by-law, in consideration of the inconvenience that may follow. He cited *Hodgson v. The Municipality of Peel*, 13 U. C. Q. B. 268, *Leeming v. Snaith*, 16 Q. B., 275 ; *Grier-son v. Municipality of Toronto*, 9 U. C. Q. B. 623.

*Hallinan*, in reply, referred to *Tylee v. Municipality of Waterloo*, 9 U. C. Q. B. 572, and to the section 2 of 20 Vic.,



ch. 80, which shewed that a certain part of the expense of filling in, grading, &c., was to be paid by the lessees and occupants of water lots.

DRAPER, C. J., delivered the judgment of the court.

I think the formal objections to the rule not entitled to prevail. The interest of the applicant in the by-law is sufficiently shewn by the fact, that he is a resident householder and ratepayer, and his statement, that he has an interest in the "operation" of the by-law. The statute does not prescribe the form of the affidavit; all it does require is, that the applicant should "have an interest in the provisions" of the by-law, and being a ratepayer, would in itself imply that. Vide *De LaHaye v. Gore of Toronto* (2 C. P. U. C. 317, 325). And all that is said about the interest, &c., relates to the applying for a copy of the by-law, not directly to the application to quash it. The same observation applies to the objection that it is not sworn Mr. *Hallinan* was the attorney of the applicant. That might have justified the city clerk in refusing the copy, but when obtained, it is competent to move the court to quash it on production of the copy, and on affidavit that it is the copy received from such clerk.

The substantial objection to this by-law is, that while it authorises the raising a loan to the full extent of £75,000, it does not shew that sum is necessary for the purposes pointed out in the third section of the act, 20 Vic., ch. 80. Without reference to decided cases, I think the meaning of that section construed upon reading this, and the former statute, 16 Vic., ch. 219, is, that the legislature gave authority to raise as much as £75,000, if that sum were found necessary for the purposes specified, but they gave no authority to raise more. The authority to raise £75,000 could only be exercised on its being found that a less sum would be insufficient. The plain intention is, to authorise the city of Toronto to execute certain works, but within certain limits of expenditure: to do the work, but to do it in such a manner as not to exceed a fixed maximum of costs; and if that maximum was not necessary, then to do it for any less sum that should be found sufficient.

Now the by-law recites the authority, and it recites that a contract has been entered into with certain parties, to do the very work contemplated by the third section of the latter act; but instead of stating how much that contract is to be executed for, what is the consideration agreed to be paid for the work agreed to be done (and which work, as I understand the statement, is all that the statute authorises), it leaves that unexplained, and the argument is, that because there are parts of the by-law which clearly contemplate the payment of a principal with interest of £75,000, and the levying a special rate sufficient for that payment, therefore we must intend that it has been ascertained that so much is requisite, although, besides the omission already noted, the first clause of the by-law authorises, not the precise sum of £75,000, but in the language of the statute, a sum not exceeding in the whole £75,000, to be raised by the mayor.

The duty of ascertaining how much the work would cost, and of contracting for its execution, clearly devolves on the corporation, and the ascertaining the cost must be a preliminary to entering into any contract. When, therefore, it is recited that a contract has been entered into, it involves an admission or an assertion that the cost is known. It may be said that the contract might be to fill in, &c., at so much per yard cubic or superficial, according to the nature of the work. But such a contract would not be within the meaning of the act, unless the number of yards were previously ascertained, as otherwise *non constat*, that £15,000 would pay for the work, and there is no authority under the act to do it at a greater cost.

The by-law appears to me to be framed, as if the authority to raise a loan for a sum not exceeding £75,000 was independent of any condition as to the actual cost of the work, provided that it did not exceed £75,000. I do not so construe the act. I think the amount to be raised is limited by the cost of the work, and therefore that the cost of the work should appear on the face of the by-law, in order to shew the sum it has been found necessary to loan.

This opinion, however, is independent of a consideration of the case of *Cortis v. Kent Waterworks Company*, referred to in argument. I do not think it applicable.

The commissioners in that case were not acting within the limits of an authority to raise, if necessary, a certain sum ; but not to go beyond it. Their authority extended to raise whatever sums were necessary for the specific objects, and they were to determine what sums were necessary. The statute under which they acted, left it to their judgment and discretion (in the first instance at all events) to say, without fixed limit, what sum should be raised. When in the exercise of this power, they resolved that it was necessary to raise a sum not exceeding £1,300 by a rate of 11d. in the pound, the court held that the sense in which those words must be understood, in order to give them any rational or definite meaning, must be that it is necessary to raise £1,300.

But before we apply that decision to the construction of this by-law, we have to consider that similar words are used in the statute, and to enquire whether the latter will bear the interpretation contended for, and if it will not, then, whether words nearly identical, can receive one construction in the act, and another in the by-law.

Now, the words of the act are, that it shall be lawful for the mayor, &c., forthwith, and without further notice or other proceeding, "to pass a by-law to raise a loan for such an amount not exceeding £75,000 as may be necessary," &c. If we were rigidly to act upon the decision relied upon, this enactment must be treated as a legislative declaration that it is necessary to raise £75,000.

And we have further to consider whether, when the by-law directs the mayor to raise a loan at a rate of interest, "*not exceeding*" six per cent., it means that it shall not be raised at a less rate of interest, for if an authority contained in the same section to raise "a sum *not exceeding* £75,000," means that it is intended £75,000 at least shall be raised, then I suppose that the similar expression as to the rate of interest must have a similar meaning.

I think we need not dwell on the absurdity of such a construction longer, to shew that this case does not fall within the principle of *Cortis v. The Kent Waterworks Company* (7 B. & C. 314).

Nor do I think that we can say there has been any

unnecessary or inexcusable delay in applying. The by-law was passed on the 27th of October, 1857, and the motion to set it aside was made on the 19th November, the fourth day of the term next following.

I should, in apprehension of the possible inconveniences of setting it aside, have gladly upheld this by-law. But it appears to me the objection is too strong to be got over, and that the rule must be made absolute.

HAGARTY, J.—The substantial objection to the by-law is, that it does not positively state the sum necessary to be raised for the purposes therein mentioned. It recites the authority conferred on the municipality by 20 Vic., ch. 80, “to pass a by-law to raise a loan for such an amount, not exceeding £75,000, as may be necessary for the purpose of filling-in, grading and levelling, &c., &c., and to issue any quantity of debentures which may be requisite and necessary therefor,” and that the municipality had contracted with certain persons to do the work, and that it was being carried on (without naming any contract price), and that the annual yearly value of the Toronto assessment was £437,931, and the annual rate in the pound required as a special rate for payment of interest, and creation of a sinking fund “for the payment of the principal of a loan of £75,000, according to the provisions of the above recited act, would be 3d. in the £.” It then enacts that the mayor may “raise by way of loan at a rate of interest not exceeding 6 per cent. per annum, from any persons or body, &c., willing to advance the same upon the credit of the debentures hereinafter mentioned, and the special rate hereinafter imposed, a sum of money not exceeding in the whole £75,000, and to cause the same to be paid into the hands of the Chamberlain, to be by him applied from time to time under the direction of the Common Council, in defraying the expense of filling-in, grading, and levelling the said space between the north line of the Esplanade and the shore of the Bay.”

The 2nd clause authorises the making of debentures not exceeding in the whole the sum of £75,000.

Section 3 directs the interest to be paid half yearly at the Bank of Upper Canada, or such place as may be agreed



on between the mayor and the party agreeing to advance the said sum ; and the said principal sum of £75,000 shall be made payable at the end of twenty years, at the Bank of Upper Canada, or such other place aforesaid.

Section 4 imposes a special rate of 3rd in the £ “for the purpose of paying the said sum of £75,000, with the interest thereon.”

The only positive statuable direction as to the form of a by-law for raising money is 14 & 15 Vic., ch. 9, sec. 4, which directs, that the preamble of every by-law shall contain “the amount of such debt or loan, and in some brief and general terms the object for which the same was created or contracted.”

The case chiefly relied on by Mr. *Wilson* in support of this by-law was *Cortes v. Kent Water Works Company* (7 B. & C. 314), commissioners were authorised by statute to “settle and ascertain the sums of money respectively necessary for the relief, &c., of the poor of the parish, and for paving streets, &c., and to make and sign a rate or rates not exceeding the amount of the respective sums so settled and ascertained.” At their meeting “it was resolved and deemed necessary to raise a sum not exceeding £1300 for the use of the poor, and a sum not exceeding £500 for the highways, by a rate of 11d. in the £ for the poor, and 3d. in the £ for the highways.” The commissioners also signed a rate of 11d. in the £ for the relief of the poor, and 3d. or other purpose. This was objected to as vague, and not being “a settlement or ascertainment within the statute.” *Bayley, J.*, after a critical analysis of the language used, pronounces the judgment of the court in favour of the sufficiency of the resolution under the statute, and of the rates struck thereon.” He says: “When it is said that it is necessary to raise a sum not exceeding £1300, the sense in which those words must be understood in order to give them any rational or definite meaning must be that it is necessary to raise £1300. The commissioners have directed 11d. in £ to be raised for the poor: this is an ascertainment of the sum which the collectors are to receive, and the persons who are to pay cannot therefore complain that it is left to the

discretion of the collectors to determine what is to be raised. The money being in the hands of the treasurers, may it not be said that there cannot be any other meaning given to the resolution of the commissioners than that the whole £1300, and £500 shall be applied as directed. They must have intended that the whole of the sum raised by the two specific rates of 11d. and 3rd. in the £ was to be applied to the objects of these rates in case it should not exceed the sum mentioned, *and if it did exceed that sum, then the surplus would be returned*; and if it fell short of that sum, then a new rate would be necessary to make up the deficiency."

In determining whether the authority of the case cited is to govern that before us, we must first notice two points of difference. First, the commissioners in the case cited had an unlimited power to settle and ascertain the sums necessary for the relief of the poor. In the case before us the power to create a loan is limited to £75,000.

In the case cited the resolution of the commissioners declares that it was necessary to raise a sum not exceeding £1300, for the relief of the poor, and it imposes a rate of 11d. for that purpose. In the case here the by-law is wholly silent as to the amount necessary to perform the Esplanade work, or whether the entire sum of £75,000 may or may not be required for that purpose. The only part of the by-law which throws light upon this grave point, is in the directions in the 1st section—to raise by way of loan a sum not exceeding £75,000, and "to cause the same to be paid into the hands of the chamberlain, to be by him applied from time to time, under the direction of the Common Council, in defraying the expense of filling-in, grading, and levelling the said space between the north line of the Esplanade and the shore of the bay."

This is the only provision in the by-law from which we can gather, that the money proposed to be raised shall be all applied to the purposes contemplated by the statute. Without it there would be nothing apparently to prevent the council from raising £75,000, when £50,000 would suffice, and applying the excess of £25,000 to general purposes, and

thus, under colour of the statute, deprive the rate-payers, as to the latter sum, of the control allowed them by law, in assenting to or refusing a proposed by-law to raise a loan. The rate-payers may naturally complain that unless the whole sum to be raised is necessary, it is a wrong on them to raise it, and it is no protection to their interests to shew that the Chamberlan is bound to apply it only to the esplanade work.

It may be said that had the by-law before us contained an express averment that it was necessary to raise £75,000 to do the work, that if such statements were untrue in fact, the ratepayers would not be better off than they are under the present by-law.

My present impression is, that the rate-payers are entitled to a positive declaration of the amount required for the purpose allowed by the statute. If such declaration be clearly untrue, and that the municipality, under colour of the act, could be shewn to be raising £75,000 for a specific object for which £50,000 only was actually required, the rate-payers would probably find either the courts of law or equity sufficiently powerful to restrain such a course.

It may be said that if this by-law be, as a matter of fact, open to the latter substantial objection, it should have been attacked on this ground, and not on matters of formal expressions. To this it may be answered that the absence of any averment in the by-law from which its necessity under the statute can be fairly inferred, is as strong an objection to its legality as an untrue statement of a necessity to raise a named sum, when a much smaller sum would suffice.

I think we can support the by-law against the objection that it does not state distinctly the sum to be raised. The amount of the rate, and the directions as to interest, and the words of the 2nd section, that the said principal sum of £75,000 shall be made payable at the end of twenty years, I think, sufficiently shew that the whole sum is to be raised.

I do not see, however, how we can do otherwise than set aside the by-law on the other objection. It seems a substantial defect going to the very root. Should such an objection pass the examination of a court of justice, I should fear we

would be establishing a vicious precedent for the loosest municipal legislation. Powers conferred by the legislature on corporate bodies to raise, if necessary, enormous sums of money for specific objects, and to create a suitable mortgage of the strictest kind on the whole property, real and personal, of the rate-payers, ought, I conceive, to be exercised with reasonable precision. I feel great unwillingness to set aside by-laws on technical grounds, and would strive to uphold them by every reasonable intendment. In this case I consider the objection as substantial as it is fatal.

*Per Cur.*—Rule absolute.

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NATRASS V. NIGHTINGALE.

*Warranty—Damages.*

The defendant sold plaintiff a stallion, warranting him to be a good coverer and foal-getter. The horse turned out worthless as a foal-getter. The jury found for plaintiff and £150 damages. The court, although considering the damages too high, refused a new trial, it being a matter entirely within the province and discretion of the jury.

DECLARATION (2nd October, 1856,) that defendant by warranting an entire horse to be a good coverer and a sure foal-getter, sold the horse to plaintiff, yet the horse was not a sure foal-getter. *Plea*, denying the promise alleged.

The cause was tried at Peterboro', before *Hagarty, J.*, in April last. It appeared, that in August, 1854, plaintiff took one Kirk with him and went to defendant, to see about buying a stallion called "King Alfred" from him. Kirk swore that in answer to questions put by him, in plaintiff's presence, to the defendant, defendant said the horse was a good coverer and a sure foal getter, and he would warrant him, and that this was the condition on which the sale was made. The price was £112 10s., payable one-fourth down, and a note for the balance to be payable in March following. The note was not given in Kirk's presence, but was given soon after this conversation. Plaintiff took the horse away, and in the following spring used him for the purpose of covering mares. He turned out worthless as a foal-getter, and died while still in plaintiff's possession in April, 1856. The plaintiff further proved that the horse, if a good foal-getter, would have been worth £250, but as it was, he was not worth more than £50.



The defendant called a witness, whose testimony went to establish that there was no final bargain until the note was given, at which time not a word was said about warranty. That plaintiff and defendant had been talking together alone for some time before this witness was called in to draw the note; and when he went in, defendant told him they had closed their bargain, but he only mentioned the price and terms of payment. This witness, and another called by defendant, valued the horse at £75 and upwards, without reference to his being a foal-getter.

The jury found for plaintiff, with £150 damages.

Last term, a rule *nisi* for a new trial was granted, on the ground that the verdict was against law and evidence, and the judge's charge, and also for excessive damages, and upon affidavits. Two were made by the same parties who gave evidence for defendant at the trial, the third by the defendant himself; one of them is of no importance, for it is all matter of opinion, not of fact. The defendant's own affidavit expressly denies that he ever warranted the horse to be a foal-getter, though he admits he did warrant him to be a good coverer. That had he known, or warranted the horse to be a good foal-getter, he would have charged £250 for him, but he only sold him at what would have been his value as a gelding. He swore that plaintiff requested him to warrant the horse to be a good foal-getter, but he refused, giving his reasons, and that this conversation took place the evening before the bargain was made. The latter part of his affidavit went to shew the jury were not impartial, and to found an application for a change of venue if a new trial was granted.

*Weller* shewed cause, this term, and filed three affidavits. The important one was plaintiff's own, shewing that Kirk was his groom and that he trusted to his judgment in buying horses, confirming Kirk's evidence as given at the trial in every material point, and unequivocally swearing to the warranty as proved by Kirk, and stating that Kirk had died very suddenly in August, 1857. The other two affidavits, merely stated the confidence of the deponents in plaintiff's veracity.

The point principally argued was the damages.

*Read*, in support of the rule, cited *Mayne on Damages*, page 88.

DRAPER, C. J., delivered the judgment of the court.

The weight of authority is certainly in the plaintiff's favour, and establishes as the measure of damages in cases like the present, the difference between the price at which the horse was sold, and the actual value of the horse, at that time, if he had been what the defendant warranted him to be. The principle seems to be that the purchaser has the right to be placed in the same position as he would have been if the defendant had fulfilled his contract.

The witnesses for the plaintiff state, that in that event the horse would have been worth £250, and the defendant's affidavit confirms their opinion, for he says that had the horse been such as the verdict of the jury states, that he warranted him, he would have asked £250 for him. The verdict is £12 10s. beyond that estimate, but that is not a sufficient excess to justify our interfering on the ground of excessive damages when the direction to the jury was such as to afford the defendant no ground of complaint.

Apart from the question of damages, I should have been very willing to have granted a new trial, if after a careful examination of the evidence, I could find a safe ground to rely on. But I am obliged to admit there is quite sufficient to warrant the finding, though there was also evidence to have upheld a contrary verdict. It is one of those cases peculiarly for a jury, and in which their decision must govern the parties. As to the affidavits, they do not help the defendant, for whatever is asserted on his side is fully met on the part of the plaintiff, and the aspect of the case in that regard is unchanged.

I think, therefore, we have no alternative but to discharge the rule.

The Chief Justice referred to *Simons v. Patchett*, 3 Jur. N. S. 742; *Hamblin v. The Great Northern R. W. Co.*, 2 Jur. N. S., 1122; *Hadley v. Baxendale*, 9 Exch. 341; *Fletcher v. Tayleur*, 17 C. B. 21; *Denton v. The Great Northern R. W. Co.*, 5 E. & B. 860.

## TUCKER V. PAREN.

*Common Law Procedure Act—Mill dam—Obstruction of water course.*

The defendant had built a mill and run it for upwards of twenty years, damming the water back a certain height by means of a log, some slabs and earth. *Within* twenty years the plaintiff built a mill lower down the river. Lately the defendant erected an earthen dam three or four feet higher than the first. And the complaint made is, that defendant, in erecting the last dam, had pressed back the water to a greater extent than his 20 years' use of the former dam entitled him to do; the plaintiff admitting that he was entitled to a certain height of water by virtue of twenty years and upwards use. The declaration was framed according to the form in the Common Law Procedure Act.

*Held*, that the plaintiff should have founded his right upon the possession of the land, and not of the mill, and that the form given in the Common Law Procedure Act is applicable only when the evidence will sustain the claim in that form.

The declaration stated that the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same; and that defendant, by erecting a dam higher up the stream aforesaid of a much greater height than he was legally entitled to do, diverted the water from the said mill, and deprived the plaintiff of the use of it. Pleas—1st, not guilty; 2nd—that plaintiff was not entitled by reason of the possession of his mill to the flow of his stream.—Issues.

This case was tried before *Draper*, C. J., at the last assizes at Toronto.

It appeared that the plaintiff had a mill situate upon lot No 11, in the 7th Concession of the Gore of Toronto, situate upon a stream running through a part of that lot, and that the defendant has a mill upon the same stream, about a mile higher up than the plaintiff's mill. The defendant's mill is turned by water now raised and kept back by a dam of earth, built across the stream, from which dam the water is conveyed to the defendant's mill by a race-way sixty rods long. From the defendant's mill the water again finds its only been built within a year or so. Up till that time, the only obstruction to the natural flow of the water was by a log and some slabs and earth, which turned the water into the defendant's mill-race, and the defendant had by a user of twenty years and upwards, acquired a right to obstruct the flow of the water to this extent. The new dam raises



the water three or four feet higher, and the injury complained of was, that the water was kept back from time to time, while this new dam was filling up, for much longer intervals, and so the natural flow of the stream was interfered with, to a much greater extent than had been the case before it was erected. The plaintiff's mill had been built only about sixteen years, and it was objected that the possession of the mill for that period did not give the plaintiff a right to the use of the stream for the working of the same, such possession not having continued for twenty years. This objection was overruled, and it was left to the jury to say whether the defendant, having by twenty years' user, acquired a certain right over the water of the stream, and to interrupt the natural flow thereof, had exceeded the right so acquired to the plaintiff's prejudice; that if there had been such excess, the plaintiff had a good right of action, and must assert it, lest by acquiescence the defendant should give the same right to maintain his present dam and the consequent diversion of the water, which he had acquired by twenty years' enjoyment of the former dam, to obstruct and interrupt the natural flow of the stream. That the declaration admitted a legal right to maintain a dam of some height, but complains of the erection of one of a greater height than such legal right would justify.

The jury found for the plaintiff, and damages 1s.

In Michaelmas Term, *Connor*, Q. C., moved for a new trial on the ground that there was misdirection in ruling that the plaintiff could recover, though he claimed only in right of his mill, which had not been built twenty years, and that the verdict was against the weight of evidence. He relied on *Frankum* and *Lord Falmouth* as establishing that twenty years' possession of the mill was necessary to entitle the plaintiff to maintain the action.

*Eccles*, Q. C., shewed cause. The declaration follows the form given by the Common Law Procedure Act. The plaintiff complained of an interruption in the natural flow of the stream, exceeding that which the defendant had an acquired legal right to make, and he and those under whom he claimed, had possessed the land through which the stream flowed



more than twenty years, though the mill had been erected within that period. He referred to the case of *Hunt v. Hespeller* in this court, 6 U. C. C. P. 269, and to *Saul v. Bartlett*, in the Court of Chancery.

DRAPER, C. J., delivered the judgment of the court.

The verdict upon the plea of not guilty is, in my opinion, right, and supported by the evidence. The plea does not put the title in issue. But I think the defendant's counsel is right in his exception to the ruling at the trial, upon the second plea. It struck me at the trial that as it was only a partial interference with the *natural* flow of the stream that was complained of, that the plaintiff might sustain his right to that extent, on the possession of the mill as well as of the land on which it stood. But the case cited of *Frankum v. Lord Falmouth* (2 A. & E. 451), clearly establishes the contrary, and shews that plaintiff should, under the circumstances, have founded his claim to the use of the water on his possession of the land. The form given by the Common Law Procedure Act, it is applicable only where the evidence will sustain the claim in that form; it cannot have been meant to enable the plaintiff, under such an allegation, to prove a right to the water resting upon some entirely difficult basis than the possession of the mill. In *Northam v. Hurley*, (1 E. & Bl. 665), the plaintiff's right to water was claimed in right of the possession of land.

The objection is of a purely technical nature, and so much so that notwithstanding the refusal to amend in *Frankum v. Lord Falmouth*, I should, as at present advised, have ventured to grant such an amendment, imposing such conditions as might have appeared reasonable and just to both parties. The law respecting the right to flowing water has much considered since that case.

The right to have a stream running in its natural course is *ex jure nature* (*Dickinson v. Canal Company*, 7 Exch. 299), and "each riparian proprietor is entitled not to the property in the flowing water, but the usufruct of its stream, for all reasonable purposes, to drink, to water his cattle, or to turn his mills, according to the nature and situation of the stream;"

(Ib. 301), and where an injury is done to any *right*, an actual perceptible damage need not be proved in order to maintain an action. *Embrey v. Owen*, (6 Exch. 353). But still the right must be claimed correctly, and the plaintiff can only recover upon the right set forth in the declaration. *Insole v. James* (Hurlst & N. 243), resembles this case very closely.

As to the right of the plaintiff to recover for such an injury as the evidence discloses upon a proper declaration, and without proof of actual damage, I refer to *Sampson v. Hodmott* (1 C. B. N. D. 590).

I think the rule must be made absolute without costs.

*Per Cur.*—Rule absolute without costs.

### HALL V. WILSON.

*Award—Motion to set aside.*

When arbitrators met and two of them agreed upon an amount to be awarded, and told the third (who dissented therefrom) that it was their intention to award this amount, and afterwards, in the absence of the third arbitrator and without notice to him the other two increased the award; and the objection being that the same two arbitrators took evidence secretly and without notice to the third, the substance of which was that they went to see a mill at the urgent request of defendant, but during his absence. *Held*, that the facts as stated shewed sufficient ground to refer the case back to the arbitrators, but the defendant not wishing that, the facts *held* not sufficient to set aside the award told.

*Held*, also, that the fact of one of the arbitrators being a creditor of one of the parties to the suit is not sufficient to make an award invalid.

*Wallbridge*, Q. C., obtained a rule *nisi* to set aside the award made in this cause on the following grounds—1. That although the reference was to three arbitrators, any two of whom might make an award, yet two of the arbitrators, in the absence of the third, and without his having any notice of their meeting for that purpose, and without giving the third arbitrator an opportunity of expressing his opinion in the amount awarded, made the said award. 2. That the award was made by the two, without notice to the third, and not at any regular meeting. 3. That evidence was received in the absence of the defendant, and without notice to him, and secretly. 4. That one of the two arbitrators who made the award is interested in the result. 5. That the award was signed in the absence of the third arbitrator and without his knowledge.

His motion was founded on three affidavits, two made by the defendant, the other by James Macdonald, who was the third arbitrator referred to in the rule.

*S. Richards* shewed cause, filing affidavits from the two arbitrators who signed the award, and from the plaintiff.

*Wallbridge*, at the close of the argument, stated that the defendant did not desire a reference, back to the same arbitrators.

DRAPER, C. J., delivered the judgment of the court.

The first, second, and fifth objections resolve themselves on the affidavits into one. The circumstances, as stated in the affidavit of James Macdonald, one of the arbitrators, were, that after meeting several times, and hearing evidence, Greely and Ward, the other two arbitrators, on the 20th March, 1857, agreed on finding an award in plaintiff's favour for £500 3s. 6½d. damages, and £33 15s. costs of reference, in which Macdonald refused to concur; and that Greely and Ward left Macdonald with the avowed intention of having an award made out in proper form by the plaintiff's attorney, but that no adjournment was made, nor any intention expressed of any other meeting being held, and that Macdonald had no notice of, nor was present at any subsequent meeting; that Greeley and Ward afterwards increased the damages awarded to the plaintiff by £27. 8s. 5¾d., and the expenses of the reference by £22 17s. 9d., which increase was after the meeting of the 20th March was broken up, and was made in the absence, and without the consent, of Macdonald.

On the plaintiff's side it was stated, that after the evidence had all been taken, Greely and Ward determined that they were bound to take into their consideration a written agreement between plaintiff and defendant relative to the defendant's mill, and the work to be done thereupon by the plaintiff. That Macdonald, on being informed of this, exhibited great intemperance of language and manner, and refused to have any thing whatever to do with the arbitration, or making the award, and took no further part in the business, and refused "in the most insulting and offensive manner to assist" in the deliberations, though often requested so to do. The affida-

vits of Greely and Ward further shewed, that at Macdonald's request they struck out £10 from the costs of reference, which they had already agreed to allow; and that when they explained to him the sum they proposed to award in plaintiff's favour, they also stated to him that the costs for witnesses' and professional men's attendance before the arbitrators were not ascertained, and that the intended to award such costs, or a portion thereof, to be paid by defendant. That they ascertained the amount of disbursements to witnesses afterwards, and resolved on allowing £3 per diem, to be paid by defendant to plaintiff for the costs of professional attendance for plaintiff, at the arbitration, having received evidence when the three arbitrators were together, that plaintiff was to pay £5 per diem: that it was part of the determination of Greely and Ward, and was so communicated by them to Macdonald, the other arbitrator, that defendant should pay a sum of \$109.69 for freight on machinery imported by plaintiff from the States; but that they had, until informed they could not legally do so, intended to award that such sum should be paid by defendant to the captain of the schooner in which it was brought; but learning from the plaintiff's attorney that the defendant would not be bound to pay it, if so awarded, they awarded the sum to be paid to the plaintiff, who had employed the captain of the schooner to bring the machinery, which is the increase of £27 8s. 5½d., referred to in Macdonald's affidavit, and which made no difference in the amount the defendant was called upon to pay; and that this sum, and the ascertained disbursements to witnesses, and the allowance to plaintiff's counsel, made up, together with the other sums mentioned in Macdonald's affidavit, the whole amount allowed to the plaintiff.

There might be grounds sufficient, on these statements, at least to justify our sending back the case to the arbitrators, because, although there is a disagreement, and one of them wholly dissents from the opinion of the other two, it is not therefore in their power to take further proceedings without notice to him, and without giving him the opportunity of discussing the matters referred until they are finally determined. But I think the facts disclose no sufficient reason for over-



turning the award. Nothing appears to have been taken into consideration but what legitimately came within the reference, and what, if the three had joined in the award, must be deemed to have been within the scope of their authority. And when the facts are closely examined, the objection seems to become more technical than substantial; for the increase of the damages awarded to the plaintiff appears to be no increase of the sum which Macdonald was aware the other arbitrators intended to award, should be paid by the defendant; and the exact amount of costs had to be ascertained before it could be added to the award. As therefore the defendant expressly desires there may not be a remitting of the case back to the same arbitrators, it must be considered whether enough is shewn to make it our duty to set aside the award altogether. The objection is that the two arbitrators have made their award without notice to the third, and without giving him an opportunity of expressing his opinion upon the amount awarded. It appears to me the objection is not sufficiently sustained in fact: that the two arbitrators, Greely and Ward, did at the last meeting of the three communicate fully to Macdonald, the third arbitrator, their intention to award in the plaintiff's favour, explaining on what grounds, and in what respects, and that he unequivocally refused to have any thing further to do with making the award, and then they had a right to complete their determination, without asking him to sign the award made in accordance with the determination so expressed.

The third objection is, that evidence was received in the absence of the defendant, and without notice to him, and secretly. The facts in relation to this objection are thus stated in the defendant's affidavit. That defendant had frequently asked that the arbitrators should go and see the mill at which the work had been done: that plaintiff, Ward, and Greely went to the mill without giving him notice thereof, and with the plaintiff inspected the mill, hearing the plaintiff's arguments and listening to him in defendant's absence, and receiving explanations from him; which visit to the mill took place without defendant's knowledge; and that Greely came back with his mind very much changed and set

against defendant. This is met by affidavits to the following effect: that Greely and Ward were told that Macdonald, the other arbitrator, had been in company with the defendant and his witnesses to inspect the mill and machinery after the first meeting of the arbitrators, and that Macdonald admitted he had been to the mill: that plaintiff's counsel, and the plaintiff, requested that Ward and Greely should also go to the mill, before making their award: that they on that, or a subsequent day, adjourned the arbitration in the defendant's presence, for the express purpose of examining the mill: and defendant offered to drive the arbitrator Greely to the mill; that Macdonald refused to accompany them, saying he had already seen the mill in the presence of defendant and his witnesses: that the plaintiff and the defendant's son, who acted as defendant's agent at the arbitration, attended Ward and Greely at the mill, and, together with defendant's foreman or millwright, explained to them every thing they required.

It appeared that meetings of the three arbitrators took place after this; and defendant's counsel, as well as plaintiff's, summed up the case before the arbitrators. And no objection seems to have been taken, until after the award, to these visits, either of Macdonald, or of Ward and Greely, to the mill. We think these circumstances quite sufficient to justify us in declining to entertain such an objection now.

The last objection is, that one of the arbitrators who made the award was interested in the result. This interest appears in the affidavit to be only that of a creditor, and it is sworn that the debt was \$500, and that the plaintiff was perfectly good for that amount, independent of this claim, as he owned a farm. The authorities shew that it is not sufficient ground for setting aside an award that one of the arbitrators is either a debtor or creditor of one of the parties to the submission.

We are of opinion therefore that this rule should be discharged.

*Per Cur*—Rule discharged.

The Chief Justice referred to *Morgan v. Morgan*, 1 Dowl. 611; *Drew v. Drew*, cited in note, *F. Russel on award*, 108;

White v. Sharp, 12 M. & W. 712; Sallows v. Girling, Cro. Jac. 277; Pering v. Keymer, 3 A. & E. 245; Templeman v. Reed, 9 Dowl. 962; In re. Morphett, 2 D. & L. 967; Young v. Bulman, 13 C. B. 623; Dalling v. Matchett, Willes, 215; Plews v. Middleton, 6 Q. B. 845; Little v. Newton, 2 M. & G. 351; Stalworth v. Inns, 13 M. & W. 466; In re. Lord v. Lord, 5 E. & B. 404; Peterson v. Ayre, 14 C. B. 665; In re. Beck v. Johnson, 1 C. B. N. S. 695.

### COTTRELL V. HUESTON.

#### *Assault—Constable*

Where the judge at *nisi prius* left it to the jury to say whether a constable who had arrested a man without a warrant, acted under a fair and reasonable supposition that he was performing a public duty, telling them at the same time his own impressions as to the evidence, and the jury found in accordance with his views as expressed.

*Held*, that the case was properly left to the jury, and the verdict was sustained.

The declaration states that the defendant assaulted and beat the plaintiff and took him into the custody of defendant. *Plea*, not guilty, the words "by statute," added at the trial at London in March last, before *Richards, J.*

It appeared that the plaintiff was acting as an auctioneer selling goods at East Nissouri, when the defendant demanded to know what authority he had, and on the plaintiff shewing him some document, he denied its validity, and seized plaintiff, and said plaintiff must come before his magistrate. He dragged plaintiff a few feet, when the bystanders separated them, and plaintiff proceeded with the sale.

The defendant is a constable, but he produced no warrant or authority for arresting plaintiff. Defendant is also an auctioneer, and had proposed to the owner of the property which plaintiff was selling, to sell for him.

The defendant's counsel moved for a nonsuit, because there was no notice of action; that the venue should have been laid in the county of Oxford, where the transaction happened, and that the declaration contained no averment of malice or want of reasonable and probable cause. The learned judge overruled the objections, reserving leave to move to enter a nonsuit, and told the jury to determine whether defendant acted under a fair and reasonable supposition that he was at

the time discharging a public duty, saying, that it did not appear to him that the evidence led to such a conclusion. They found for plaintiff, damages £5.

In the following term, *Miller* obtained a rule *nisi*, renewing the objections taken at the trial, and stating as a ground for moving for misdirection, that the learned judge should have directed a verdict for the defendant. The rule was in the alternative for a nonsuit or a new trial.

In Michaelmas Term, *Horton* shewed cause. He cited Taylor on Evidence, s. 294 (2nd edit.); Kirby v. Simpson, 10 Exch. 358; Arnold v. Hamel, 9 Exch., 404.

*Eccles*, Q. C., supported the rule.

DRAPER, C. J.—I think the question was properly submitted to the jury. It was in effect asking them whether the defendant arrested the plaintiff, honestly believing that his duty as a constable called upon him to do so—See Booth v. Clive (10 C. B. 827)—and I think they have properly decided against the defendant, for the evidence shewed he was actuated by very different motives. Several of the objections raised apply to the provisions of the statute 16 Vic., ch. 180, which refers only to justices of the peace, and not to a constable.

I think the rule should be discharged.

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MUNICIPAL COUNCIL OF HURON AND BRUCE V. MAC-  
DONALD ET AL.

*Ejectment—Court Houses—Custody of.*

Upon ejectment brought to try the question whether the sheriff or the municipal council were entitled to the control of the court house, and the appointment of a custodian of it.

*Held*, that the title of the plaintiffs, by virtue of a deed from the town council of the town of Goderich, being admitted, the defence must fail, the question in dispute not being decided.

This was an action of ejectment brought to recover possession of certain property, being the court house in the market place in the town of Goderich.

Defence for the whole.

The plaintiffs by their notice, claimed under and by virtue of a deed from the town council of the town of Goderich to the plaintiffs.



By the defendants' notice, the defendant Macdonald asserted title in himself to the court house, situated on the said land, as sheriff of the united counties of Huron and Bruce, and as such sheriff entitled to the care and custody of the same by virtue and under the statute in that behalf made and provided.

And the defendant Fraser claimed the right to the occupancy or tenancy of the premises in dispute in this cause, under and by virtue of an appointment duly made by the sheriff of the united counties of Huron and Bruce, in pursuance of the statute in that case made and provided.

At the last assizes at Goderich, where the cause was entered for trial, a verdict was taken for the plaintiff's by consent, subject to the opinion of the court upon the following facts agreed to by the counsel on both sides.

The title of the plaintiffs to the land in question is admitted, as appears by the paper annexed, signed by the defendants' attorney, and the 20 Vic., ch. 88. The building upon it is used as a court house, and public offices for the united counties of Huron and Bruce: the sheriff, clerk of the peace, registrar clerk of the county court, clerk of the county council, and county treasurer having their offices there, but the plaintiffs do not admit any right on the part of all these officers to such accommodation. The gaol and court house are separate buildings, half a mile apart. The sheriff has appointed a keeper of the gaol, who lives in that building. The court house and public buildings aforesaid, have apartments appropriated for the residence of a keeper, who, on the first occasion, was appointed by the municipal council, the sheriff at the time claiming the right to appoint. Afterwards the sheriff put in a keeper chosen by himself, without reference to, or consent of, the council, and against their expressed wish. This person now claims possession of the building as against the council under his appointment by the sheriff, and refuses to leave though the council wish to dismiss him.

This action has been brought in consequence, and the question in dispute is whether the sheriff or the municipal council has the right to appoint the keeper, and in whom the care and keeping and right to possession of the court house,

building and offices above mentioned is under the circumstances stated.

*Robinson, C.*, for plaintiffs.

*D. G. Miller and Cameron, H.*, for defendants.

DRAPER, C. J.—We do not feel called upon, in an action of ejectment brought by the municipal council to recover possession of the court house in and for the counties of Huron and Bruce, to decide upon the validity of the appointment of the housekeeper of that building, or in whom the right to appoint such housekeeper rests.

The plaintiffs' title to the building is admitted, and the defence being general sets up a right to exclude the municipal council from possession. We are quite clear the sheriff had no such right, and cannot confer it by his appointment upon the other defendant, and that is enough to determine this action in the plaintiff's favour. They have an undoubted right to hold their meetings there.

The court house, from its very name, as well as from the provisions of law, requiring the erection of a gaol and court house in every county or union of counties before they are constituted separate municipal authorities, is a building devoted to and intended for certain public uses. The plaintiffs may be considered as holding this building, and the legal estate in it, for and subject to these uses, and would be guilty of a breach of quasi trust, and as regards the courts of justice of a high contempt, if they pretended to prevent its use for such public purposes; but speaking only my own impression, and not as determining any question, I apprehend it will be found that, subject as aforesaid, the property and the entire control of the building is in them.

Judgment for plaintiffs.

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#### BRATT V. LEE.

*Bill of sale—Evidence of loss of—Search.*

*Held*, that evidence by plaintiff and wife of a search for and the loss of a bill of sale, under which the judge ruled he must prove property, was insufficient to let in secondary evidence of the contents of such bill of sale.

The plaintiff Bratt replevied a mare, and declared against

the defendant for taking and unjustly detaining her. The defendant pleaded that the goods and chattels in the declaration mentioned were the goods and chattels of the defendant, and not of the plaintiff. On which issue was joined.

At the trial, at the county court for Essex, the defendant gave evidence that she was his property. The plaintiff set up a right to hold her in pledge and security for money lent by him to defendant. During the examination of the witness it came out, that the defendant had given to the plaintiff a bill of sale for this mare and some other property, but it was asserted it was lost by plaintiff; and further, in the progress of the cause it was said, that as it had not been filed in the county clerk's office, it was considered by the plaintiff, and defendant also, as inoperative.

For the defendant it was insisted—1. That as it was under this instrument the plaintiff first got his right to the mare, it must be produced, and the learned judge so ruled. Evidence was then offered to shew that the plaintiff himself and his wife had made search, in the presence of witnesses (who did not make any search themselves) and had declared they could not find it, and claimed upon that to give secondary evidence of its contents. The learned judge ruled that sufficient proof had not been given to establish the loss; and that as the possession had been changed, the filing would probably have been unnecessary as regarded third parties, and at all events, as between the parties themselves, it made no difference. And on this ruling the defendant obtained a verdict.

A new trial was afterwards moved for, on two grounds—1. That the bill of sale formed no part of the plaintiff's title to the mare. 2. that if it did, sufficient search was shewn to let in secondary proof of its contents.

After hearing council on both sides, the learned judge discharged the rule *nisi* for a new trial; and this case comes before this court on appeal from that decision.

A. Prince, for appellant, cited *Thomas v. Griffiths*, 6 Bing. 533.

*O'Conuor*, contra.

DRAPER, C. J., delivered the judgment of the court.

I think the learned judge was right upon both points. The evidence of the plaintiff's witness shewed, very clearly, that the bill of sale was made for the purpose of conveying certain chattel property, including the mare, from defendant to plaintiff. It appeared that the plaintiff was setting up a qualified, not an absolute right to the animal: that he asserted the defendant owed him money, and this animal was held in security for it. Now it is obvious, from this statement, that as the bill of sale was connected with the plaintiff's acquiring the right, and, as appeared, the possession also of the mare, and, as the parties themselves considered, a writing proper, if not necessary, to express and effectuate their agreement, whatever it was, the presumption is that the possession acquired under that instrument continued by virtue thereof until the taking complained of in this action; and this presumption would continue until it was clearly shewn that some more recent arrangement was substituted for it. It was therefore necessary for the plaintiff to produce the bill of sale, or satisfactorily account for it.

As to the search. The document was in the plaintiff's possession. He cannot be allowed to make his own declarations of evidence, and therefore his statement that the bill of sale was lost, unaccompanied by any thing else, would be insufficient. For the same reason, his mere declarations that he had made search for it and could not find it are insufficient. It is proof of the fact, not of what he declared to be the fact, that is required. The evidence offered does not go far enough, for it ends by resting the proof of the loss on proof of the plaintiff's declarations, and those of his wife respecting it.

If a witness had aided him in the search, so that he could swear the paper was not found; and if it appeared the search was so conducted and in such places as to afford a reasonable ground for concluding that it was made *bona fide*, both as regards the witness, and also as regards the plaintiff, by giving and using all possible facilities to make it effectual, then on its proving unavailing, secondary evidence would be admissible. But the present case falls very far short of that.



Enough does not appear to shew that the document had really been abandoned, or treated as useless, so as to increase the probability of its loss, or destruction, and so to dispense with proof of a strict and careful search. In the present case so much might turn on the contents of the bill of sale, that if possible it ought to have been produced; and secondary evidence should not be received, so long as it is exceedingly possible that it may be at this moment in the plaintiff's possession.

I think therefore the appeal should be dismissed.

Appeal dismissed.

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REED V. CARRALL ET AL.

*Consideration.*

A deposit of a sum of money by the plaintiff in the hands of a third party for a limited time, during which the defendants would ascertain facts. *Held* sufficient consideration to support a promise or agreement by the defendants to delay entering a judgment and issuing execution.

This was an appeal from the county court of Oxford.

The declaration was so loaded with words, that it required a little patience to extract what is of importance to the question raised. The first count stated that one J. McR. recovered a verdict against plaintiff for £71 19s. 9½d. That this sum included about £18 for goods bargained and sold, but not delivered to plaintiff, and that plaintiff having only actually received a small part of these goods, was entitled to get the residue from J. McR., or to get the verdict reduced between £16 and £17.

That thereupon, and before the time for entering the judgment of J. McR., the plaintiff agreed with the defendants, who were McR.'s attorneys (and in reference to these goods which he said he had applied for but could not obtain), that in consideration that he would at their request deposit £75 in the hands of D. G. M., his own attorney in the suit with McR., they promised that they would not enter up the judgment of McR. against him (plaintiff) until D. G. M. should return from Iowa, whither he was about immediately to proceed, and that they (defendants) would stay the proceedings,

and in the meantime would ascertain from J. McR. the facts in reference to the said residue of goods, and that on the return of D. G. M. they would settle with plaintiff for the amount that would be due for the debt and costs in the said action.

Averment—That plaintiff did deposit the £75 with D. G. M., of which defendants had notice, and the defendants, before the return of D. G. M., and before a reasonable time had elapsed for his return, entered up judgment for the full amount of the verdict and costs, and issued execution, whereon plaintiffs goods were levied on by the sheriff.

The defendants demurred generally to this count, and the court below sustained the demurrer, against which judgment the plaintiff appeals.

*D. G. Miller*, for appellant, referred to *Legget's case*, Latch, 206.

*Eccles*, Q. C., contra, cited *Watson v. Murrel*, 1 C. & P. 307; *Iveson v. Connington*, 1 B. & C. 160; *Hall v. Ashhurst*, 1 C. & M. 714; *Haigh v. Brooks*, 10 A. & E. 309; *Bainbridge v. Firmstone*, 8 A. & E. 743.

DRAPER, C. J.—It appears to me the judgment cannot be sustained. The defendants' promise is founded upon a consideration that the plaintiff would deposit a sum of money in the hands of a third person, for a limited time, and that during that time they will ascertain certain facts in which plaintiff is interested, and that they would during that time delay entering a judgment against the plaintiff. Probably the money so deposited was intended as a security for the payment of which plaintiff would be found really indebted to the defendants' client, and if it had been so, and that statement had been added, the consideration for the promise would have appeared more plainly.

But I think the plaintiff's parting with his money, as is stated, is a consideration sufficient to support the promise. There is some disadvantage to the plaintiff. At the least, he loses the use of his money, pending the absence of D. G. M. He incurs the possible contingency, however remote, of losing the money altogether, and though the actual dis-

advantage may be but small, that does not affect the question whether it will support a promise founded on it. The proportion of value is not the point, but whether there was any value to the party making the promise, or *any* disadvantage to the party to whom it is made, or as is expressed in some of the old authorities, any thing which for the matter of it may be good in the promise itself, may be good in the consideration of a promise, although it be such a thing as the party promising hath no benefit by it at all, yet if the party to whom the promise is made have any damage or burden by it, the consideration is good.

It appears to me, therefore, that the count is sufficient; we have nothing to do in this stage, with the question how really trifling the damages may turn out.

Judgment for plaintiff on demurrer to first count.

## FARLEY V. GLASSFORD.

### *Laches—New trial.*

Where a defendant shewed that he and his witnesses were absent from court in consequence of his illness at the time, and the damages might, at all events, have been materially lessened by their testimony: the court ordered a new trial on payment of costs.

The declaration stated that defendant assaulted plaintiff, and threw a quantity of spirituous liquid into his eyes, whereby plaintiff was greatly injured, and has been from thence hitherto deprived of the sight of his right eye &c., &c.

*Pleas*—1st Not guilty. 2nd. Payment before suit, and acceptance in satisfaction by plaintiff of £2. Issues.

The trial took place in October last, at Brockville, before the Chief Justice of Upper Canada. It appeared that the plaintiff and the defendant were casually together, with a great many other people, at a tavern at Prescott, in the middle of the day; that the defendant invited those present to drink at his expense and, that he poured out for himself some brandy into a tumbler, and having tasted it threw it behind him, and that it went into plaintiff's face and eye, as the plaintiff happened to be standing close by; that plaintiff suffered great pain, and inflammation took place in his right

eye; for which he had been for a long time under medical treatment, and two doctors stated their belief that his eye would probably never be fully restored. No one appeared for the defendant at the trial, and the jury gave a verdict for plaintiff, damages £137 10s.

In Michaelmas Term. *D. B. Read* applied for a new trial on affidavits, stating that defendant had taken upon himself (as a practising lawyer), the getting up the defence, and gave a brief to counsel; that on the day on which the cause was tried he was confined to his bed with illness, in consequence of which material witnesses for him did not attend, as he had told them he would notify them when their presence would be necessary, which, owing to his illness, he could not do. He further swore to the discovery of new and important evidence, and that he believed he had a good defence on the merits. He also filed the affidavits of a physician, stating that he had examined plaintiff's eye, and believed there was disease which could not have been produced by the throwing brandy and water into his eye. *Read* also moved on the ground of excessive damages.

*Crooks* shewed cause. He contended, that the damages in this case were clearly in the discretion of the jury, and the amount was not such that the court could pronounce them to be extravagant. At all events, he contended, a new trial should not be granted, except on condition of some sum to be named by the court, being paid by defendant at once.

DRAPER, C. J., delivered the judgment of the court.

The amount of the verdict is large, and was obtained without the defendant's witnesses being heard, whose evidence might have materially lessened it. Moreover it is sworn that there is evidence that the continuing injury to the eye arises, in the opinion of a physician, from a different cause than the defendant's act, and it cannot be doubted, that the continuance and probable permanence of the injury, and its resulting from the defendant's misconduct, must have greatly influenced the amount of the verdict. The defendant's affidavits are not met in any way, and he explains his



own absence and that of his witnesses in a manner which relieves him from the imputation of wilful negligence in attending to the defence.

Under the circumstances I am disposed to grant a new trial on payment of costs.

Rule absolute on payment of costs.

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### SMALL V. THE GRAND TRUNK RAILWAY COMPANY.

#### *Toronto Esplanade Act.*

*Held*, that the corporation of the city of Toronto and their contractors were under the first Esplanade Act, 16 Vic., ch. 219, authorised to enter upon the freehold water lots, as well as those held by their lessees, within the limits of the Esplanade for the purpose of its construction.

TRESPASS, *quare clausum fregit*, known as the water lot in front of plaintiff's town lot, letter C., containing one acre covered with water, described thus: commencing at the water edge of the Bay, at high water mark on the course south 16° east. from the south-east angle of the said lot, letter C. being the north-east angle of the water lot; then south 16° east 2 chains 50 links: then south 74° west 4 chains; then north 16° west 2 chains 50 links, more or less, to the water's edge aforesaid; then east along the water's edge to the place of beginning, and wrongfully converted plaintiff's goods, viz., a wharf and pier, stonehouses, timber, lumber, stones and cribs, to their own use. Second count.—That the defendants agreed to construct the esplanade through the Toronto bay in front of the city of Toronto, and commenced the construction, for the mayor, aldermen and commonalty of the said city, and have been, and are making a portion thereof through and across a certain water lot, pier and wharf of the plaintiff's, and constructed the same negligently, and did damage there, and negligently and unnecessarily interrupted the approach to, and use of the wharf. Plea.—Not guilty by statute. The following statutes were noted in the margin of the plea, 14 & 15 Vic., ch 51, sec. 20; 16 Vic., ch 37, sec. 2.

The case was entered for trial at the last assizes at Toronto, and a verdict was rendered for the plaintiff by consent, damages 1s., subject to the opinion of the court on a special

case to be settled by the parties; and if the court decide that the defendants are liable, the amount of actual damage to be ascertained by arbitration in such manner as the court may direct.

The question submitted for the opinion of the court was, whether the defendants are liable to the plaintiff in trespass for the construction by their sub-contractors of the esplanade through the water lot of the plaintiff in the city of Toronto, which water lot is held by the plaintiff in fee simple, and which construction of the esplanade was commenced before the passing of the act of parliament, 20 Vic., ch. 80.

The statute 16 Vic., ch. 219, after reciting certain letters patent, dated 21st February, 1840, a certain license of occupation, dated 29th of March 1853, and a petition from the city of Toronto for "authority to erect the proposed esplanade in front of and upon the said water lots according to the condition of the said letters patent, license of occupation, and the leases to the several tenants thereof" enacts, that the mayor, &c., of the city of Toronto may enter into contracts with any person to "erect and build an esplanade in front of and upon the water lots in the said city, as described in the preamble, and the letters patent and license of occupation therein mentioned" on such plain, &c., as the common council of the city may adopt. Section three provides that when the corporation shall have completed that portion of the esplanade fronting upon or crossing the water lots, *after the owners, proprietors or lessees of such lots shall have failed to construct the same within the time and in the manner herein provided*, the city surveyor shall declare the amount each of such owners and lessees ought to pay to the city for the construction of such esplanade upon and across such water lots respectively. By section seven it is enacted, that as soon as the esplanade shall be completed, &c., the mayor, &c., of the city, shall forthwith convey to the respective owners of the said water lots entitled to the same, under the said letters patent, the several and respective pieces, &c., of land described by the letters patent, and designated on the plan thereto annexed, provided that it shall be lawful for any of the owners, proprietors, or lessees of

the water lots to build that portion of the esplanade fronting upon or crossing their respective premises upon giving notice, &c., *provided that the said mayor, &c., shall commence the said esplanade within one year from the 29th May, 1853,* and shall comply with, &c., all the conditions contained in the license of occupation. The eighth section recites letters patent, dated the 14th of July, 1818, vesting a certain strip of land commencing at the south-eastern part of the city and running to the western limit of Peter street, and bounded in front by the top of the bank, in trustees in fee, and authorises the transfer of that piece of land to the corporation of Toronto, upon the same trust, and gives power to the corporation to make the public walk contemplated by those letters patent, or to continue the esplanade through and in front of that land.

The letters patent, dated 21st February, 1840, among other things, granted, first, the piece of land to the city of Toronto, described as follows: "Commencing at the intersection of the produced western limit of Berkley street with a line produced from the point near the site of the late French Fort West of Toronto garrison to Gooderham's windmill; thence north  $16^{\circ}$  west 4 chains 30 links, more or less, to the southern limit of that part of the water lot in front of town lot C. on King street, as originally granted to John Small; thence south  $74^{\circ}$  west 4 chains, more or less, to the limit between town lots C. & F. on King street produced, otherwise to the south-western angle of the said John Small's water lot; thence north  $16^{\circ}$  west 4 chains, more or less, to the water's edge of the bay," and soon, following the outlines of water lots previously granted, and including, with the exception of such water lots, all the space lying between the water's edge of the bay, and a line drawn from near the site of the old French Fort and the windmill, but going no farther west than Princess street, and other pieces of land covered with water similarly situated, as far west as Grave's street, upon the trusts set forth in the preamble to the statute 16, Vic. ch. 219, one of which is in the following words, "and upon this further trust, that the said city of Toronto shall convey and assure to the different individuals or persons who now are or

may be entitled *to the lots originally granted*, or such parts and portions of the said lots respectively, as any persons now are or may be entitled to in the said lots *heretofore granted*, all and singular such parts and portions of the said strip of land along the bank as adjoin to the said lots heretofore granted, provided always, the same shall be conveyed to the person or persons subject to such general regulations as affect the whole as to buildings thereon as well as to the regulations respecting the esplanade. There is a similar trust for conveying the strips of land covered with water lying to the south of the water lots, "already granted." And there is a proviso preventing the city of Toronto making any other disposition of the strips adjoining the water lots before granted.

The 20th Vic., ch. 80, recites that a contract was made with the defendants to construct the esplanade according to a plan to the said contract annexed, and that it has become necessary to grant further powers to the mayor, &c., of Toronto, to enable them to complete the esplanade according to the said contract and certain other works connected therewith; and sec. 1, gives power to the mayor, &c., and their contractors, &c., to enter on all lands and water lots, to cross wharves, &c., within the limits of the *esplanade, as laid down in the plan annexed to the contract*, to take possession, and use the same to the width of 100 feet, for the purposes of the esplanade, to take down and remove buildings, &c., on the line of the esplanade. Section 2 authorises the filling up the space between the north line of the esplanade and the present shore of the bay of Toronto.

The trespass complained of was committed before the passing of the last act, and for the purpose of constructing the esplanade as provided for by the 16 Vic., ch. 219.

*Eccles*, Q. C., insisted that the last-mentioned act gave no power to enter upon water lots which had been granted by the crown in fee simple.

*Galt*, contra, contended that both the recital to this statute and the sections of it contemplated, and authorised the construction of the esplanade, as well across the lots previously granted to individuals, as over those leased by the city of



Toornto; and that the contract, and whatever had been done under it, was legalized by the latter act.

DRAPER, C. J., delivered the judgment of the court.

It appears very clearly that the project of making an esplanade one hundred feet in width along the front of the city of Toronto was not contemplated when the grant under which the plaintiff claims his water lot was made. But it is equally plain that when the patent of 1840 was issued, that project was fully sanctioned by the government, and that it was contemplated that the esplanade should be made across the plaintiff's water lot, as well as across other water lots, which had also been granted in fee simple, and with reference to the plan for improving the front of the city. The crown could not, of course, grant any rights or powers in respect to the water lots so disposed of; but it could and did give great facilities to negotiate with the proprietors of those lots, by putting into the hands of the city corporation, lands covered with the water adjoining to, and in front thereof, as well as strips of land lying to the north of those lots on trust to convey the same to such proprietors, "*subject to the regulations affecting the esplanade.*" The combined motives of private interest, and of a great public improvement, it was evidently imagined, would be found sufficient to induce the proprietors to accept the grant of the additional strips, subject to the regulations affecting the esplanade, in other words, subject to having the esplanade constructed where the plan pointed it out.

It was however found necessary to pass the act 16 Vic., ch. 219. This act adopts and sanctions the plan for the esplanade; it recites that it would conduce to the prosperity and health of the City of Toronto, that "it should be *forthwith* built;" it empowers the corporation to contract for the building thereof, in front of and upon the water-lots as described in the preamble and letters patent, one of which is the water-lot owned by plaintiff; it expressly reserves to the owners, lessees, and proprietors of the water-lots, the right of constructing the esplanade themselves over their own lots; but if they neglect or refuse to do so, then after the corpo-

ration has done it, such water lots are chargeable with a proportion of the expense of construction, to be ascertained in the manner pointed out by the act, and the act provides that the instalments of the sum so charged, and the interest, may be recovered from the owners of the lots "in like manner with the same accumulations, and subject to the same provisions" as local taxes in the city, and if not so recovered, that the lots may be sold as the lands of non-residents may be sold for non-payment of local taxes.

The act further confirms the trusts in the patent by requiring the corporation to convey to the respective owners of the water lots entitled under the letters patent the respective strips of land granted to the corporation for that purpose. And it provides that the corporation shall commence the esplanade within one year from the 29th of March, 1853.

Now, although a power was reserved to the owners, proprietors, or lessees of the water lots, to erect that portion of the esplanade fronting upon or crossing their respective premises, upon giving notice of their intention within two months after the passing of the act, and completing the same according to the condition of the said letters patent, and the map attached thereto, within one year from the passing of that act; yet, as appears to me, that reservation not only implied, that had it not been made, the power conferred on the corporation would have come into immediate operation; but that the legislature contemplated that those powers extended to the performance of the act, the right to do which was thus reserved to the owners of the lots. The use of the words *owners* and *proprietors* points to the grantees of the water lots, in fee simple, as distinguished from the *lessees*.

Taking the whole together, it appears to me, that though not as strongly and plainly expressed as might have been, yet, that enough appears to authorize an entry upon the plaintiff's lot, for the purpose of constructing the esplanade after he had failed to undertake and perform the construction himself. Probably (though I do not give any judgment on that point) after it had been constructed, the fee simple

would have remained in him, the public having only an easement over it. If so, this and some other difficulties are removed by the latter act of 20 Vic., which recognizes the contract under which the defendants were acting in doing that which plaintiff complains of as a trespass, and makes a somewhat different provision for charging the owners of water lots with the expense of the construction of the esplanade over their lots.

But I think that without invoking any retrospective aid and operation from that statute, enough appears to sustain the defence. The powers claimed under the 16 Vic., as to the making this esplanade over private property, bear a strong analogy to those conferred by the Municipal Corporations Act, 12 Vic., ch. 81, as to making and opening new streets or "*other communications*" within the limits of the city, though the argument for the defendants could not be rested on those powers, for want, among other reasons, of any by-law passed by the corporation pursuant thereto. There can be no doubt that it was competent to the legislature in express language to authorise the entry upon the plaintiff's land; and I think that what they have said is amply sufficient to justify the construction of the esplanade according to, and in the place designated by, the plan attached to the letters patent.

Nothing was rested by the plaintiff's counsel on the second count. I understood that it was withdrawn from consideration.

I think therefore the defendants are entitled to the *postea*.

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## OVERHOLT V. THE PARIS AND DUNDAS ROAD COMPANY.

### *Costs—Final judgment—Outer County.*

In an action brought against a road company for having so constructed their road as to obstruct a flow of water from plaintiff's lands, the plea of not guilty by statute, *held* not to bring the title to the land in question under the county court, or division court acts, so as to entitle the plaintiff to tax superior court costs without a judge's order.

Where all the proceedings in an action previous to final judgment have been taken in the deputy's office in an outer county, a judgment signed and taxation of costs in the principal office in Toronto *held* not irregular.

D. G. Miller, in Trinity Term last, obtained a rule *nisi*,

that the taxation of costs and entry of judgment, and all subsequent proceedings, should be set aside with costs.

First, because the first process in the action was issued out of the office of the deputy clerk of the crown and pleas in the county of Oxford, and the other proceedings in the cause were carried on through that office, and the taxation of costs and entry of judgment were had in Toronto.

Second, because full costs were taxed and allowed to the plaintiff, contrary to the statute.

Or why the taxation of costs should not be set aside, and the defendants allowed to set off their taxed costs against the plaintiff's verdict and costs on the grounds—1. That no regular notice of taxation was given.

2. That full superior court costs were taxed to the plaintiff.

An order had been made by Sir *J. B. Robinson* in chambers, on the 13th August, staying all proceedings on the judgment entered, until the fourth day of Trinity Term.

The application was grounded upon affidavits, shewing that the action was brought to recover damages for injury to a small portion of his land, arising from the defendants (an incorporated road company) having so constructed their road across a drain as to prevent the water flowing from his land at certain seasons of the year.

That no title to any corporeal or incorporeal hereditament, or to any toll, custom, or franchise, was brought into question or dispute, nor was the validity of any devise, bequest, or limitation, under any will or settlement disputed, and that the amount of damages was the only question in dispute, and that the jury found for plaintiff, damages £4.

That after the verdict, the plaintiff's counsel moved the judge at the last spring assizes for the county of Oxford, for a certificate, which was refused.

That the plaintiff's attorney, on or about the 5th June, gave notice of taxation of costs for the following day, in the office of the deputy clerk of the crown for the county of Oxford.

That the deputy clerk of the crown refused to tax costs of the superior court without a judge's certificate, and informed the plaintiff's attorney that he would only tax on the principle of division court costs.



That the plaintiff's attorney then withdrew, and the defendant's attorney had no notice of further proceedings until about 1st of August, when a letter from his agent informed him that full costs of the superior court had been taxed in Toronto.

That the venue is laid in the county of Oxford, in which county the attorneys for plaintiff and defendants reside.

That the defendants' attorney had no notice of the intended taxation in Toronto, and that he did nothing towards having the papers forwarded there; and that the action was commenced by writ of summons, issued on 1st November, 1856, out of the office of the deputy clerk of the crown for the county of Oxford.

That on the 28th of July last, one of the firm of attorneys in Toronto, who were the agents for the defendants' attorney, being in the crown office, was asked by the agent of the plaintiff's attorney, if he appeared on the taxation of costs in this cause, to which he replied, that he had received no notice of taxation, and would not attend.

That on the next day full costs were taxed, and judgment entered at the principal office in Toronto, no one attending on behalf of defendant, as notice of taxation had not been served.

That execution was issued on the 29th July, addressed to sheriff of Oxford; and a sworn copy of the taxed bill was put in, amounting to £18 19s., exclusive of the verdict.

The rule was enlarged by defendants' counsel until last Michaelmas Term, when *Blevins* shewed cause. He filed two affidavits stating that no certificate for costs was granted by the judge at the trial, as he (the judge) stated that he did not consider the plaintiff, in such a case, required a certificate for taxing full costs.

That a notice of taxation of costs, &c., was served on the agent of the defendants' attorney, to take place on 2nd July, at the principal office in Toronto, but costs were not taxed thereupon.

That on the 27th July, the agent of the plaintiff's attorney went to the office of the agent of the defendants' attorney to serve a copy of notice of taxation for the following day, but

no person was in the office, though the door was open, it being between four and five o'clock in the afternoon; and that he placed a copy of such notice on a conspicuous part of a desk, at which he had frequently seen Mr. Doyle, one of the partners, at work. That on the next day he went to the crown office, and found Mr. Doyle there, and spoke to him of the taxation; when Doyle said he knew nothing of the matter, and requested the taxation should stand over until the next day, that Mr. Carroll, another partner of the firm, might be present and attend to it; so the taxation stood over till the following day, when the costs were taxed.

That the defendants pleaded not guilty by statute. That the defendants' attorney was present in the deputy clerk's office for the county of Oxford, when a clerk of the plaintiff's attorney was giving directions to have the papers transmitted to Toronto, and enquired of such clerk whether the plaintiff's attorney had applied for a certificate for full costs.

He referred to the statutes 8 Vic., ch. 13, and ch. 36, sec. 3; 12 Vic., ch. 69, sec. 1, and the C. L. P., 1856.

DRAPER, C. J., delivered the judgment of the court.

The 5th sec. of the 8th Vic., ch. 13, gives jurisdiction to the district (now county) court, in all matters of tort relating to personal chattels where the damages shall not exceed £20, and were "*titles to land shall not be brought in question.*" The 59th section enacts that in any suit to be brought in the court of Queen's Bench after this act shall come into effect, "which suit may be of the proper competence of the said district courts," no higher costs shall be taxed than district court costs, unless the judge who presides at the trial shall certify in open court immediately after the verdict is recorded that it was a fit cause to be withdrawn "from the district court and commenced in the court of Queen's Bench."

The 20th section of the County Courts Procedure Act (19, 20 Vic., ch. 90) enacts that the county courts shall hold plea of all personal actions where the debt or damages claimed are not more than £50; and of all causes or suits relating to debt, covenant, or contract, where the amount is liquidated or ascertained by the act of the parties, or the signature of

the defendant to £100. Provided always, that the county courts shall not have cognizance of any action *where the title to land shall be brought in question*, or in which the validity of any devise, bequest, or limitation, under any will or settlement, may be disputed; or for any libel or slander; or for criminal connection or seduction.

Whether this action was of the proper cognizance of the county, or of the division courts, (see 16 Vic., ch. 177, sec. 1) must depend on the construction to be given to the words "action where title to land shall be brought in question," in the county courts act: or, "in which the title to any corporeal, or incorporeal hereditaments; or to any toll, custom, or franchise, shall be in question," in the division courts' act.

This is a personal action. The only plea is the general issue per statute, which it is contended, I presume, enables the defendants to bring the title in question, just as if not possessed had been pleaded. In *Hawkes v. Richardson* (9 U. C. Q. B. 229), the court do not seem to treat the plea of not guilty by statute, as affecting the power or duty of a judge to certify for costs.

The case of *Latham v. Spedding* (17 Q. B. 440, and 15 Jur. 576), establishes that the plea of not possessed in an action of trespass *quæ. cl. freg.* does not necessarily raise a question of title, within the meaning of the Imperial Statute (9 & 10 Vic., ch. 95, sec. 58), which contains the phrase, "*shall be in question*," as in our division court act. The court there held that the onus lay upon the plaintiff to prove that title did *bona fide* come in question at the trial, as the words, "in which the title to any hereditaments, &c., shall be in question," extended only to actions in which the question of title actually arises in the course of the trial.

I see no reason for treating the phrases, "where the title to land shall be brought in question," and "in which the title to any corporeal hereditament shall be in question," as having a different meaning. The latter words have received in the case above cited an interpretation similar to the very words in the first phrase, and are held not to mean "that the defendant has so pleaded that it (the title) might

possibly have come in issue." I do not see therefore that any thing is shewn to bring this case within either of the provisos which limit or oust the jurisdiction of the inferior courts, and therefore I am of opinion the plaintiff was not entitled to tax full costs, having no certificate.

The remaining question is as to the regularity of the plaintiff's proceedings in entering his judgment in the principal office at Toronto, instead of in the deputy's office in the county of Oxford, whence the writ issued, and in which county the venue was laid.

The statute 8 Vic., ch. 36, which was the first act authorising judgments to be entered any where except at the principal office at Toronto, provided that all proceedings instituted in any suit commenced by process sued out of the office of a deputy clerk of the crown, should be continued and carried on in that district "to final judgment." The deputy clerk was, for the first time, empowered to tax the costs, and enter final judgment in all suits commenced within such district where a cognovit shall have been executed, and also in cases of *non pros.*, and where judgment shall be final in the first instance: providing, that in any suit the taxation of costs might take place at the principal office, and that immediately after the judgment was entered, the deputy should transmit the same, with all papers thereto belonging, to the principal office, where "such judgment shall be entered of record and docketed."

This act was explained and amended by the 12 Vic., ch. 68, which enacted that each deputy clerk of the crown might, at the election of the party entitled to judgment, tax costs and enter final judgment in all suits in which the venue should be laid, and the proceedings carried on, and the original pleadings filed in his office, whether the judgment be upon verdict, computation, cognovit, warrant of attorney, or otherwise, and whether such cognovit be given in the first instance, or after other proceedings had in the cause. This provision has also been repealed. Then comes the Common Law Procedure Act, which provides, (sec. 6) that in transitory actions the writ may be sued out of any of the offices at the option of the plaintiff; but (sec. 7) if local, the writ must be



sued out of the office within the proper county, and that (sec. 9) all proceedings to final judgment shall be carried on in the office from which the first process in the action was sued out, and that (sec. 11) all writs of execution may issue from the office wherein the judgment is entered, or, after the transmission of the roll to the principal office, such writs may, at the option of the party entitled thereto, be issued out of the principal office. Every deputy clerk of the crown (sec. 15) must within three months after the entry of each judgment transmit to the principal office every such judgment roll, and the papers belonging thereto, and such judgment shall also be entered and docketed at the principal office. By this section it is for the first time made the duty of the deputy clerk to minute and docket, in a book to be kept by him, all judgments he shall enter, and particulars are given what such entries must shew, and a certified copy of the entry is under certain circumstances made evidence of the judgment, the declared object of this latter provision being to preserve evidence of judgments on which many titles to land depend. The taxation of costs by a deputy clerk may as of right be revised in the principal office (sec. 12).

There is much ground for arguing that the legislature intended by the expression "all proceedings to final judgment" *shall be carried on* in the office whence the first process issued, to include the entry of judgment, and this view is rather confirmed by sec. 10, which provides that final judgment may be entered, upon a cognovit or warrant of attorney to confess judgment, given and executed in the first instance, and before the suing out of any process in any office. For the option given in this instance may be treated as indicating an opinion that in other cases there was no such option: and that the language of the statute was to be considered as mandatory as to the office wherein judgments were to be entered.

But it is obvious that the legislature mean that all judgment rolls shall be brought to the principal office, and entered and docketed there, and that the provision for the preservation of evidence by having two entries is not a universal rule; for there is no deputy's office in the county in which the principal office is situate, and consequently in actions com-

menced in the principal office, there can only be one entry of the judgment. The taxation of costs at every outer office is, as of course, subject to revision at the principal office; so that we may not unreasonably hold, that the statute rather confers a power of entering than makes it obligatory to enter a judgment in the outer before any entry in the principal office. It is very plain that such a power is a great advantage and convenience both to suitors and the profession, while on the other hand we may easily imagine cases in which it would be deemed preferable to enter the judgment in the first instance at the principal office; as, for instance, when the record of *nisi prius* and other papers have been brought before the court in term, on the moving or arguing of some rule.

Upon the whole, though not free from doubt, I am inclined to hold that a party entitled to enter judgment may, but is not obliged to enter it in the outer office, and that he may enter it in the first instance in the principal office, on obtaining the transmission of the necessary papers. I have felt more doubt on the point from the absence of any provision for compelling the deputy clerk of the crown to transmit all the papers in a cause before judgment to the principal office. But I suppose, if necessary, a judge's order might be obtained for this purpose; and if the papers were *vexatiously* withheld, with the costs of the application. A rule of court would remove any difficulty, if this be the true construction of the statute, if rule No. 148 does not go far enough for the purpose.

In my opinion, therefore, the taxation of the costs should be set aside; and I think we should also give the defendant the opportunity of setting off his taxed costs against the verdict, and such costs as the plaintiff is entitled to recover.

#### KING ET AL. V. THE WESTERN ASSURANCE COMPANY.

##### *Insurance policy—Abandonment.*

When the owners of a vessel, which was stranded, gave notice of abandonment, and the master afterwards, on behalf of those concerned, entered into a contract to get the vessel off, which was done; and the jury expressly found that the evidence was such as to warrant a prudent owner in abandoning the vessel as a total loss, and rendered a verdict for the plaintiff generally: the court, being of opinion that the evidence warranted the finding of the jury, and that the plaintiffs were entitled under it to give notice of abandonment (as of total constructive loss), sustained the verdict.

This action was brought to recover the sum of £1000.

upon a policy of assurance, dated 14th of May, 1856, on the schooner "Welland Canal," from the 1st of May to the 30th of November, 1856. The declared value of the vessel for average loss was £1,400. The declaration averred that the vessel was lost, wrecked, stranded, and cast ashore and destroyed; that proper notice was given to the defendant's secretary; that plaintiffs, according to the usage and custom of merchants, abandoned and renounced to defendants all their right in the vessel, and requested defendants to pay them. First breach—That the defendants, although ninety days have elapsed, have not paid the said sum or any part thereof. Second breach—Stating that the vessel, by perils of navigation, was cast ashore, and was strained, bulged, broken, &c., insomuch that she was wholly disabled from proceeding without being got off and repaired, which would have cost a large sum of money, whereupon plaintiff abandoned her to defendants, and gave due notice to the secretary of the Company; yet defendants, though ninety days elapsed, have not paid. There was a third breach upon which nothing turns, it being for a partial loss only. The fourth breach is also immaterial. The defendants pleaded to the first breach, that the vessel was not lost, &c., as in the first breach alleged. 2nd—To second breach, that after the vessel was cast ashore the plaintiffs hauled her off, and the defendant sufficiently repaired her so that she was thoroughly sound and seaworthy, and gave notice to plaintiffs and offered to restore her, but plaintiffs refused to receive her. 3rd—Demurrer to the fourth breach. 4th—That at the time of making the policy the vessel was unseaworthy, of which plaintiffs were aware, but neglected to give defendant notice thereof. 5th—That after the making of the policy the vessel became unseaworthy, but plaintiffs, knowing it proceeded on their voyage. 6th—That plaintiff obtained the policy by fraud, covin, misrepresentation, and concealment of material facts.

The trial took place at the Niagara assizes in October last, before *Hagarty, J.* The leading facts were, that the vessel, being seaworthy, sailed from Cleveland on the 20th of August, bound for Hamilton. That she was driven

ashore near Fairport in a gale of wind on the 21st, and was to all appearance strained and greatly injured. That the master immediately made his protest and telegraphed to her owners at St. Catharines, one of whom (King) came up immediately, and, after looking at the vessel, told the master he should abandon her, and returned, and on the 23rd of August, mailed a notice of abandonment to the defendants, which they received on the 25th. That on the 22nd of August, and after King had left Fairport, having expressed his intention to abandon, the master entered into a contract with certain parties to get her off, and signed it on behalf of the owners, and underwriters of the vessel and cargo, and that she was got off. That the defendant's agent came up to Fairport also, and saw her got off, and proposed repairing her, and made a proposal to King, who had come up again, but who declined, saying that he had nothing to do with it. A survey was held on the vessel after she was taken to Cleveland, and upon the survey the vessel was repaired, and on the 19th September, 1856, a letter was written on behalf of defendants to plaintiff, informing them the "Welland Canal" was repaired and ready to be delivered to them on payment of charges, which were:—

On the general average adjustment .....	\$383	80
On the particular average---repairs..	\$795	00
One-third off, new for old .....	265	00
	530	00
Less amount, self-insured---i.e., difference between £1000 and declared value, £1,400.....	151	43
Payable by defendants to plaintiffs under the policy .....	378	57
	1178	80
	378	57

Amount plaintiffs would have been out of pocket, \$800 23

To which some other charges, about \$100, were to be added.

The plaintiffs took no notice of this, and the vessel was taken to Port Stanley, and another account was rendered by defendants to plaintiffs, claiming expenses of bringing to Port Stanley, charges there, and interest to May, 1857; in all, £304 2s. 8d. The plaintiffs persisted in their intention to



abandon. There was contradictory evidence as to the value and condition of the vessel after her repair, also as to the condition she was in when stranded: but the weight of evidence led to the conclusion that she was worth much less than at the time of the assurance made, and the right under the circumstances to abandon. It seemed clear that the master had made an extravagant bargain to get the vessel off, which was accomplished with much facility, and in about fourteen or fifteen hours.

The learned judge asked the jury to say: 1st—Was the vessel sound and seaworthy when the policy was effected? They found she was. 2nd—Was the policy obtained by fraud, covin, or misrepresentation, or concealment of material facts by plaintiff? They said it was not. 3rd—Would a prudent owner, uninsured, in the state in which the vessel was, have repaired or abandoned her? They said he would have abandoned her. 4th—Was the vessel so repaired as to be in as good a state as she was before being stranded? They said she was not; and they found for plaintiffs—damages £1000.

In Michaelmas Term, *Connor*, Q. C., obtained a rule *nisi* for a new trial, on the ground of misdirection in not charging the jury that the tender of the vessel by defendants to plaintiffs, under all the circumstances, put an end to the action: that the right to abandon was waived, or that no such right existed under the circumstances; that the evidence shewed no abandonment in fact, or for a new trial on the law and evidence.

*W. Eccles* shewed cause, citing *Gross v. Withers*, 2 Burr. 683; *Hamilton v. Mindes*, 2 Burr. 1198; *Bainbridge v. Neilson* 10 Ea. 329; *Benson v. Chapman*, 6 M. & Gr. 792. (Note—This case was reversed in the House of Lords in error, 8 C. B. 950).

*Connor*, in reply, cited *Roux v. Salvador*, 3 Bing. N. C. 266; *Irving v. Manning*, 2 C. B. 784; *Williams v. Shaw*, 1 Esp. N. P. 92; *Arnold on Insurance*, 1193; *Dunning v. Hardy*, 2 Phil. 294.

The only statements or conditions in the policy necessary to be considered are the following: "And in case of any

loss or misfortune, it shall be lawful and necessary for the assured, their factors, servants, and assigns, to sue, labour, and travel, and to take all proper means for, in, and about the defence, safeguard, and recovery of the vessel, or any part thereof, *without prejudice to this assurance.*” “Provided further, that a regular survey be held as soon after an accident as possible by competent persons mutually chosen by the owner or master, and by an agent or other person appointed by the company. The surveyor will be required to discriminate between those defects that have arisen from the perils of the navigation, and those from wear and tear, It is understood and agreed, that in case the said vessel, upon any loss or such damage happening, shall be sold without the consent in writing of the secretary, or some authorized agent of the company, the said company shall not be liable in any manner for any more or greater damage than if such vessel had not been sold, although the loss by such sale may happen to be greater than the cost and expense of saving and repairing such vessel.”

DRAPER, C. J.—I have felt pressed with the consideration how great is the difference between the declared value of the vessel in May, 1856, £1,400, and the value set upon her since she was stranded and repaired, amounting only to about £300 or £400, coupled with the evidence, that by the repairs she was, according to part of the testimony, made as good as she appeared to have been before the stranding. The defendants, after the cause had been entered for trial at a former assize, obtained leave to add the two pleas negating her seaworthy, and one alleging fraud and material concealment in obtaining the policy; but they certainly adduced no evidence in support of them on which they could have anticipated a verdict in their favour, and they were found against them. And, moreover, in a paper produced at the trial, and proceeding from themselves, in a letter dated the 5th of April, 1856, they value the vessel at £1,500, and in their statement of particular average they do not complain of over-valuation, but assuming the declared value to be right, and their own share of the risk being £1000,

they treat the plaintiffs as self-insured for the difference, £400.

The only point in the case therefore, is the abandonment which involves the question of actual or constructive total loss. There was no actual total loss, for the vessel exists in fact, and therefore the inquiry as to that is limited to the inquiry whether, on the facts shewn, she was lost, so far as any benefit or value to the owner was concerned. The mere restitution of the vessel (if the plaintiffs are called upon to pay as much or more then it is worth when restored) would certainly not enable the defendants to insist successfully that the loss was not total. Lord *Ellenborough* says, "If the voyage be lost, or not worth pursuing, or the ship be reduced to such a state that she cannot proceed without refitting, the expence of which would greatly exceed her value, the assured may abandon and claim as for a total loss." *Thompson v. Royal Exchange Assurance Company* (1 M. & S. 30).

In the first place, the condition of the vessel after she was stranded, and when King, one of the plaintiffs, saw her after the accident, was fairly and properly left to the jury, and they have expressly found, that a prudent owner in that condition of an insured vessel, would have abandoned—i. e., as I understand the phrase, would not have attempted to get her off and repair her, so as to pursue the voyage.

No question is raised as to a sufficient notice of abandonment having been promptly sent. The loss took place on the 21st of August, at Fairport, on the south side of Lake Erie. The notice was received in Toronto, on the 25th of August. On the 26th, the plaintiff, King, and defendant's agent were at Fairport together. The latter endeavoured to prevail on King to enter into some arrangement about the vessel before she was got off, but he declined, stating that he had nothing to do with it, and seems to have adhered to that course. I do not find that the defendants made any reply to the notice. If they did not mean to accept the abandonment they should have said so.—*Hudson v. Harrison* (2 B. & B. 97-108), and their conduct in the absence of any such express declaration, afforded evidence rather that

they accepted than that they refused it, for they adopted the master's contract for getting the vessel off, they held a survey with knowledge that plaintiffs persisted in abandoning, and they made the repairs to the vessel. And the first proof of any notice we have to the plaintiffs, shewing that the defendants treated the vessel as still the plaintiffs' property, is the letter written at Toronto, on the 19th of September, informing them the vessel was at Cleveland, ready to be delivered on their paying the demands against them on account of the vessel. I do not find in the policy any condition under which the underwriters can take possession of the vessel, determine what repairs are necessary, have them performed, and then require the owner to pay for them, and take the vessel back. If it were a constructive total loss, and an abandonment by the owner, there could be no such right, and in the case of a partial loss, it could only be by express contract, and I have seen no case reported even of that kind, and certainly none which treats the underwriter as having such a power by law without it.

If it became necessary to decide whether the master, after being told by his owner that he ment to abandon, could, by entering into a contract to get the vessel off, bind such owner to pay the price contracted for, it might admit perhaps of some doubt. But that by such an act he cannot alter the position of his own in relation to the underwriters, so as to affect the right to abandon, appears to me clear. No such question has, however, been raised on the defence.

On the whole, I am of opinion that the case went properly to the jury; that the evidence of constructive total loss and of abandonment was sufficient to warrant the verdict; and although my inclination would rather be to restrict, than to extend the right to abandon, as being somewhat inconsistent with the prevalent doctrine, that a policy of insurance is a contract to indemnify. I do not see any ground to warrant our granting a new trial.

HAGARTY, J.—The finding of the jury justifies the owners in giving notice of abandonment. The contract made by the master for the benefit of all concerned, to get the vessel hauled off, was, in my opinion, no waiver as against



the owners of this rightful abandonment. Arnold, vol. 1. page 197, lays it down: "The effect of a notice of abandonment, if accepted or made on good grounds, is to vest the ownership of the property in the underwriters; from the moment of the loss the master will be considered the agent of the underwriters in all acts done by him from that time, within the scope of his authority, given to him by the policy, to sue, labour, and travel, for the defence, safeguard and recovery of the subject insured." In this case the underwriters assumed all the master's acts—paid his contract for hauling off, and took charge of the vessel for repairing, &c. The other point made by *Dr. Connor*, viz., as to the tender of the vessel before action brought, is, I think, disposed of by the jury, by the finding that she was not restored by defendants to as good a condition as before the accident. Even had the policy contained a clause expressly authorising the underwriters to repair and restore, &c., in the face of this finding, I do not see how the defendants could hope to succeed. The case of *Benson v. Chapman*, in the House of Lords, 8 M. G. & Scott 950, might at first seem to support defendants' view on the first point, but it was the case of an insurance on freight, ultimately earned by the ship after notice of abandonment given, and vessel subsequently repaired by the master abroad.

In giving the unanimous decisions of the judges on the questions referred to them by the Lords, *Alderson, B.* says, "It is material to observe that this special verdict does not state that the plaintiff abandoned when he first heard of the accident, or even when he first knew that the ship was under repair, *nor that in common prudence, he would not, if he had himself been at Pernambuco and uninsured, done precisely what the master did.*"

Rule discharged.

The Chief Justice referred to the following cases: *Cazallet v. Barbe*, 1 T. R. 187; *Mellish v. Andrews*, 15 Ea. 13; *Tunno v. Edwards*, 12 Ea. 491; *Mitchell v. Edie*, 1 T. R. 608; *Allwood v. Henckell*, Park on Ins. 280; *Barker v. Blakes*, 9 Ea. 283; *Gernon v. Royal Exch. Assur. Co.*, 6 Taunt. 383; *Holdsworth v. Wise*, 7 B. & C. 694; *Irving v. Manning*, 2 C. B. 784; *Davis v. Chapman*, 2 M. & Gr. 921.

MCDONELL V. THE BEACON FIRE AND LIFE ASSURANCE  
COMPANY.

*Insurance—Fraud.*

The not communicating at the time of the proposal for an insurance, the fact that there was an insurance already effected, with another company. *Held*, not to be such a wrongful concealment as to sustain a plea of fraud, avoiding the policy.

DECLARATION, that defendants, by a certain policy of insurance, sealed, &c., dated 20th September, 1856, insured all the goods, wares and merchandize of plaintiff, in the store of plaintiff, situate in the village of Colborne, from loss or damadge by fire to the amount of £1000, and although, while the policy was in force, the goods, &c., were lost and damaged by fire to a greater amount than the said sum of £1000, yet defendants have not paid, &c.

Pleas: 1. *Non est factum*. 2. That the policy was obtained from defendants by plaintiff "by the fraud covin wrongful concealment of certain material information which ought then to have been communicated to the defendants, and by a misrepresentation of the plaintiff, wherefore the defendants say that the said policy was and is void in law." 3. That at the date of the policy the plaintiff had no goods in the store to the value of £1000. 4. That the goods were not accidentally and wholly destroyed by fire. 5. That plaintiff had not in his store, at the time of the fire, goods to the value of £1000 and upwards. 6. That due proof of the loss and damage was not given according to the conditions of the policy. 7. That in the claim made for the loss and damage, there was fraud in taking the quantity, nature and value of the goods supposed to have been burnt, &c. 8. That while the policy was in force, and before the fire, the plaintiff procured an additional insurance, to the extent of £500, to be effected in the Provincial Insurance Company, on the said goods, &c., and that due notice of this last insurance was not given to defendants, nor was the amount thereof indorsed upon the defendants' policy. Issues.

The trial took place at the last autumn assizes, held in Kingston, before *Richards*, J. The policy of insurance was put in an admitted, assuring £1000 on plaintiff's goods

for a year, from 1st September, 1857. Among the conditions to which the policy was subject were: III. "If there be any assurance at any other office of the property assured at this office, notice of every such other assurance must be given, and the same, with the several amounts thereof, must be stated either in the policy, or by an indorsement upon it, otherwise the assurance with this office is void, and the assured not entitled to recover or be paid in case of loss, and in the event of any other assurance with any other office, the company will pay its rateable proportion only of any loss having regard to every other subsisting policy, in whose name soever such policy may be." X. "All persons sustaining any loss or damage by fire, are forthwith to give notice thereof to the company, at their office in Kingston, or to the company's agent, through whom the assurance was effected, or resident near where the fire occurred, &c., &c. But if there be any fraud, deceit, or evil practice *in the claim made* for any loss, or any false declaration or affirming in support thereof—or that the fire shall have happened by the procurement or wilful act, means, or connivance of the insured or claimant, or any collusion, false evidence or deceit, or wilful mis-statement, or fraudulent mis-description in the nature or value of the property destroyed, damaged or claimed for, the claimant shall, in every such case, forfeit all right to restitution or payment, under the policy."

"All notices are required to be made in writing, and all indorsements and allowances must be signed by the manager or one of the clerks of the company." "No receipts are to be taken but such as are printed and issued from the head office, signed by the manager, and countersigned by one of the clerks or known agents."

A good deal of evidence was given on both sides, as to the amount of plaintiff's stock and goods on hand at the time of the fire, which took place on the 13th March, 1857. No question now arises on this part of the case, for the defendants do not rest any application on the finding on the 1, 3, 4, 5, 6, or 7th pleas. But it appeared a policy had been effected by a person from whom the plaintiff had made extensive purchases, on the stock in plaintiff's shop, for £500, on the 19th August, 1855, which policy was assigned



to the plaintiff in March, 1856, and was renewed by the Provincial Insurance Company, who entered into it—to and with the plaintiff, on 14th August, 1856, and was in force therefore when the defendants entered into the policy now sued upon, and when the loss by fire happened. It further appeared that at the time the plaintiff made his proposals of insurance to the defendants' agent at Cobourg, he did not state that he had this insurance with the Provincial Company for £500, nor did he communicate that fact until the 31st December, 1856, when he wrote to the same agent at Cobourg, mentioning the fact of his being insured to the extent of £500, but not stating with what company. And it did not appear that the agent to whom the defendant wrote, communicated the information to the defendants until after the fire. There was no proof nor suggestion of any insurance effected by plaintiff after that made with the defendants. At the close of the plaintiff's case, the defendants' counsel objected, that the plaintiff could not recover because he gave no notice when he effected the assurance with the defendants, of the prior policy with the Provincial Assurance Company. This was overruled. The defendants' counsel then asked for leave to amend the 8th plea, in accordance with the evidence, so as to state the existence of a prior assurance, and no notice thereof to defendants when this policy was entered into by defendants. This the learned judge refused. The jury were directed to say whether as a matter of fact, there was any fraudulent or wrongful concealment of the previous policy having been effected, and if so, to find for the defendants. The learned judge commented on the fact, that the conditions of assurance are printed on the policy itself, and that no express enquiry seems to have been made at the time of the proposal to insure, respecting previous insurance, so that till the policy was received, the plaintiff's attention may never have been drawn to that condition. As to the 8th plea, he submitted the question which that raises, namely, whether the plaintiff, while the policy with defendants was in force, could effect an additional assurance with another company.

The jury found for the plaintiff, damages £1000.

In Michaelmas Term, *Wallbridge*, Q. C., obtained a rule



*nisi* for a new trial, on the ground : 1. That the jury should have been directed, that not informing the defendants of an existing policy for £500 in another office, was the concealment of a material fact, and a fraud on the defendants. 2. That on the evidence the jury ought so to have found.

*Kirkpatrick*, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the court.

I have not been able to satisfy myself that the not communicating to the defendants' agent, at the time of the proposal for insurance, the fact that there was an insurance already effected with another company, was a fraud, as being a wrongful concealment of material information, which ought then to have been communicated to defendants.

I think the proper construction to be put on the plea, is that a concealment, affecting the risk to be run, meaning by risk not the quantum of loss the insurer might sustain, but the danger of incurring any loss whatever. It must be a concealment of something which the assured was *a priori* bound to disclose, of a fact material to be known, as bearing upon the amount of premium, or the nature, or situation, of state of the property, respecting which the insurance was proposed, or of some matter the knowledge of which was essential to enable the insurer to understand fully what his undertaking would extend to, so that the risk undertaken shall not be different from that which was contemplated by him, varying the object of the policy so far as he was concerned.

There may be many conditions, which the insurer can stipulate for and make part of his contract, on the non-fulfilment or non-observance of which he may expressly stipulate the contract shall become void. But to sustain this plea, it appears to me the fact relied upon must be one which would be sufficient to avoid the policy, though there was no stipulation of that description annexed to or contained in it.

I arrive at this conclusion with some regret, because I should have preferred that the jury had been in a position to determine the question which the facts presented, but

which facts did not strictly sustain the 8th plea. The stipulation that notice should be given of every other insurance on the goods is a reasonable one in itself, and forms an essential part of the contract. The plaintiff, although he may not have been apprised of it at first, before he received his policy, must be taken to have known it, as soon as he had the opportunity of reading the conditions, and the case would probably have been more satisfactorily disposed of, if there had been no technical difficulty, in trying whether the plaintiff had given notice to the defendants of the previous insurance, and whether they had not accepted it as sufficient, and waived the previous breach of the policy. As it is, I think the rule must be discharged.

Vide *Anderson v. Fitzgerald*, 17 Jur. 995. *Anderson v. Thornton*, 8 Exch., 425.

*Per Cur.*—Rule discharged.

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### MOLSON'S BANK v. BATES.

#### *Trial, postponement of—Setting aside verdict.*

In an action on a promissory note, in which the defendant pleaded his indorsement had been obtained by fraud, a second postponement of the trial had been refused by the presiding judge, and no defence having been made, the plaintiff obtained a verdict. A motion for a new trial, founded upon the defendant's affidavit uncorroborated by other evidence, and the allegations in which were met by counter affidavits, was refused.

DECLARATION stated that defendant Bates, on 1st July, 1856, made a promissory note, payable to the bearer at the Bank of Montreal, in Brockville, for £500, six months after date that Bates indorsed and delivered it to plaintiffs. Averment, of presentment, non-payment and notice. Pleas: 1st. By defendant Bates, that the making and indorsement by defendant Bates were procured by the fraud of one H. L. Sharing and others, of which plaintiffs had knowledge when they received the note. The defendant Colton pleaded a similar plea, on which issues were joined.

The trial took place at Cornwall, in October last, before the Chief Justice of Upper Canada. An application was made to put off the trial, which was refused, and no defence

being made, the plaintiffs recovered a verdict for £542 4s. 3d. The note was drawn, payable to Bates's own order, and was indorsed by him.

In Michaelmas Term, *Sherwood*, Q. C., obtained a rule *nisi* for a new trial on an affidavit sworn by the defendant Bates, stating that the other defendant endorsed for his accommodation: that the note was obtained from him by Samuel Cochran and Henry L. Sharing, by fraud and misrepresentation: that they represented that Sharing was the *bona fide* holder of a lottery ticket which had drawn the chief prize, namely, of defendant Bates's mill, at Smith's Falls, and produced the ticket, and proposed to surrender or sell the same for £500 in hand and a good note: that he, believing, &c., paid Sharing, in presence of Cochran, £500 by two cheques since paid, and the balance by the note in question: that he afterwards ascertained Sharing was not the *bona fide* holder of the said ticket, but had, in concert with Cochran obtained the same fraudulently from one John Macdonald, the true owner, for some trifling sum: that Macdonald got Sharing and Cochran indicted at Montreal for conspiracy, and the facts of the case appeared in the newspapers and were matter of public notoriety; that at this time defendant Bates went to Montreal, and met Mr. Sache, the cashier or manager of Molson's Bank, who asked deponent about the matter, and that defendant then told Sache all he knew, and the manner in which the note had been obtained from him: that he (Bates) did not believe the note had then come into plaintiffs' hands, as Sache made no mention of it: that in the event of a new trial, he will be able to establish the fraud and the plaintiffs' knowledge of it; that Sharing has been long absent from the Province, owing to difficulties with his creditors, but is said to be about returning: that defendant made every exertion, but ineffectually, to find him in time for the trial: that defendant went to Montreal to subpoena Cochran to attend the trial, but could not find him: that defendant has understood he was warned to keep out of the way, and has little doubt the warning came from plaintiffs, and that he kept away in consequence: that in the event of a new trial he feels

certain he will obtain the attendance of Sache, Cochran, Sharing and other witnesses, to establish the defence.

*S. Richards* shewed cause; he filed two affidavits, one from Sache, swearing that neither defendant Bates nor any one else ever informed him of any thing respecting the manner in, or the representations upon which, the note sued upon was given, and that to the best of his recollection he had no conversation with Bates, between the date and the maturing of the note: that no warning notice or request was, to the best of his knowledge and belief, ever given to any person to prevent his attendance as a witness at the trial, and no step was taken to prevent or to influence any one from so attending: that to the best of his knowledge, information and belief, it is not true that any fact can be proved, or that any circumstance has occurred, or conversation taken place, or information given, tending to shew that plaintiffs are not *bona fide* holders of the note without notice of any fraud, illegality, or defect in the making, inception, consideration, or indorsement thereof. 2nd. An affidavit from Samuel Cochran, swearing that he never received any warning or intimation of the intention of defendants, or either of them, to subpoena or summon him as a witness at the trial, or notice or advice to keep out of the way: that in fact he did not keep out of the way, or avoid service of such subpoena, but, on the contrary, attended to his ordinary business, in Montreal, as usual.

DRAPER, C. J., delivered the judgment of the court.

I have examined the affidavits and papers which were produced before the learned Chief Justice at the trial. It seems the trial of this cause had been put off at the previous assizes. The application to put off the trial was rested at the last assizes, as the motion for a new trial is rested now, entirely on the affidavit of the defendant Bates, who does not now produce one affidavit of a third party corroborating his statements, nor even that of John Macdonald, who, as he (the defendant) represents, was defrauded by Sharing out of the lottery ticket, the surrender of which was the consideration for the note now sued upon. While the application was



answered, as the present one is, by the denial of Mr. Sache, and by an affidavit of the party (John Crawford, of Montreal, broker,) that he obtained the note from Sharing in the ordinary course of business, and for valuable consideration, and negotiated it with the plaintiffs in the ordinary course of his business, and in ignorance of any circumstances tending to cast any suspicion upon it, or upon Sharing's title to it.

I felt it right to examine these affidavits, because the application for a new trial resting wholly upon affidavits, resembles an appeal from the decision of the learned Chief Justice, in refusing to put the trial off, and to see whether a stronger case is made before us for relief, than was made before him for delay.

The facts seem to be, that the defendant Bates put up this mill of his by lottery, whether with or without other property does not appear. We may not unreasonably assume, that the price at which he sold the tickets produced a very ample consideration for the property he was thus disposing of. The ticket entitled to the "chief prize," namely, the mill, is brought to him by Sharing, who represents himself to be the fortunate holder, and he buys it; or in other words buys back his mill, for £1000, a price, we may also presume, which he was well satisfied to give. Now, if the matter stops where it is, I do not see that he has any thing to complain of. He has sold his property for what he was content to get, and he has bought back his mill for what he was content to give. But he says Sharing was not the rightful holder of the ticket. That may or may not be so, but if he were not, we must go a step further, and see that he, this defendant Bates, is liable and compellable to convey the mill to the party who really did own it; and if this should turn out to be the case, then as this action is founded on a negotiable note, we must further see that the plaintiffs, the holders, are liable to be met by the same defence, which might, if sustained, be an answer to an action brought by Sharing. I think the affidavits, taken altogether, entirely fail to sustain this latter proposition, and I must say I see no reason for giving Mr. Bates any further opportunity of avoiding the payment of this note, while he

retains the mill, and may very possibly have a legal right to retain it, and retains also the money he received as the price of his lottery tickets.

I think the rule should be discharged.

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GERMAIN ET UX. V. SHUERT.

*Dower—Satisfaction.*

The demandant of dower had accepted for her claim as dower, a bond from the tenant of the land for the purpose of securing to her as part of a family arrangement, a maintenance which, after enjoying for some time, she relinquished. She had also added her own hand and seal to the bond. *Held*, that even though the recitals in the bond did not operate by way of estoppel, that a jury were warranted in finding that it amounted to a satisfaction of the plaintiff's claim to dower.

DOWER claimed by the demandant, Christiana, as widow of Joseph Shuert, deceased, *unde nihil habet*.

The only plea that need be noticed was to the effect, that the former husband of demandant died intestate, and that after his death, an agreement was made, which was set forth in the recital to a bond dated 9th June, 1846, by which bond the tenant became bound to the demandant (before her second marriage) in the sum of £250, subject to a condition whereby, after reciting the death of the first husband intestate, leaving his widow, four sons, and three daughters, and that before his death he verbally expressed his wishes touching the disposition of his estate, and that his family had agreed to carry his wishes into effect, and that it had been covenanted and agreed by the tenant that in consideration of a conveyance to him made by his eldest brother, heir-at-law of his father, deceased, of the land out of which the demandant claims dower in this action, also of the interest in said lot of land then possessed by demandant, by her claim of dower, that the tenant should secure £37 10s., by mortgage on the said land to his youngest brother, which mortgage had been given, and should pay to his brother Henry and Jacob £12 10s. each, which payment had been made, and for the claim of demandant as dower on said property, and of his sisters in their father's estate, the tenant did undertake, promise, and agree for the considerations aforesaid, and in consideration of 5s. which he acknowledged

himself to have received from demandant, to maintain during their lives, in a decent and respectable manner, according to the way the said parties had been accustomed to live, the demandant and the tenant's said sisters, so long as they might remain single, and choose to make the tenant's house their home, and conduct themselves in a proper and becoming manner, and give their aid as a portion of the family in conducting the work of the house; the maintenance to consist of board, clothing, lodging, washing, and every thing of like nature that they had been accustomed to have; it was conditioned that if the tenant should perform such covenants and agreements then the obligation should be void. That the demandant then accepted and received the said bond in execution of the said agreement, and upon the terms aforesaid; and that the tenements mentioned in the count and in the recital of the bond are the same. Replication denying the agreement alleged between tenant and demandant, and that the bond was accepted in satisfaction or discharge of her dower; and further, that demandant did not choose to make the tenant's house her home, but after the making of the bond, and before her second marriage, she left the tenant's house, and has not since resided there.—Issue.

The trial took place before *Hagarty, J.*, in November last, at the Hamilton spring assizes. The seisin and demand of dower were admitted. It appeared that the demandant's first husband had died about 1841. Evidence of the annual value was given. The bond set forth in the plea was produced, and it was admitted that both the demandant and tenant had put their hands and seals to it. The learned judge stated he should leave it to the jury to say whether that bond was taken in satisfaction of dower, when it was agreed that a verdict should pass for the tenant, with leave to the demandant to enter it for her with £80 damages for the detention, if the court should think the defence no bar.

In Michaelmas Term, *Read* obtained a rule *nisi* accordingly, to which.

*O'Reilly Q. C.*, shewed cause, insisting that at all events the plea disclosed an equitable defence, and the words, "for equitable defence," might even now be added. But he con-

tended the plea showed an estoppel on demandant, as she executed the bond, and thereby acknowledged under seal the agreement therein set forth.

*Read contra*, contended no such amendment could be granted; it would be adding a plea, rather than making an amendment. As the plea stands, he contended, it shewed no defence at law, the alleged estoppel being merely by way of recital.

DRAPER, C. J. delivered the judgment of the court.

From the manner in which the question has been left to us, I suppose we are to assume that the bond was received by the demandant in satisfaction of her claim, and that we are only called upon to decide whether the facts pleaded disclose a satisfaction sufficient in point of law, in the same manner as if there had been a general demurrer to the plea.

The demandant's former husband must have been dead several years before the date of the bond. There was ample time for all parties to understand their relative positions and particular interests, and looking at the recitals in the bond as a whole, there is nothing unfair or unreasonable in the arrangement. It is not shewn how long after the date of the bond the parties continued to act upon the agreement recited. This action, which is the first positive indication of disagreement, is of recent date, so that it may be presumed all parties acted under the arrangement for a considerable period. That in pursuance of the agreement, the tenant undertook and fulfilled certain liabilities, seems conceded, and I do not see why this acceptance of the defendant's bond for the benefit of the demandant, evidenced by her own hand and seal, may not be treated as an act *in pais* deliberately performed by her, and founded on a sufficient consideration to satisfy her claim. In the argument no authorities were referred to on behalf of the demandant to shew that she might not *accept* a satisfaction for her dower, though "an assignment of other land whereof she is not dowable or of a rent issuing out of the same, is no bar of her dower." Co. Litt. 346.

I think the bond, to which she was a party, furnished



evidence to go to the jury. That the recitals in it were evidence, even though not by way of estoppel, against her of an agreement, and that they might find on this evidence that she had accepted the bond as a satisfaction of her claim to dower, and treating their verdict as a finding on that point, I think it should not be set aside.

Whether such an amendment as was suggested could be allowed, for the purpose of sustaining the verdict, I do not at present decide.

Rule discharged.

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### GAMBLE v. McKAY.

#### *Usual covenants—County Register—Evidence.*

"Usual covenants" in a conveyance to a purchaser extend only to the acts of the vendor, if he have been himself a purchaser for valuable consideration, if he take by descent to the acts of himself and his ancestors, and if he take by devise to the acts of himself and his devisor.

A certificate purporting to shew the registered conveyances of land from the county registrar's office under the hand of the deputy registrar, held not admissible evidence of title under the 13 & 14 Vic. ch. 19, sec. 4.

DECLARATION on a bond dated 2nd September, 1856, in a penalty of £120. The condition was that if Gamble "shall pay the sum of twenty-five pounds in stock in the Buffalo, Corning and New York railroad, being five shares at twenty-five pounds each, at ensealing of this bond, to the above bounden Neil McKay, then and in such case, the above bounden Neil McKay, his heirs, executors and administrators shall and will do, upon reasonable request, and at the cost and charge of the said William Gamble, his heirs, executors and administrators, at or within three months from the date of this instrument, make, execute and deliver, or cause to be made, executed, and delivered, a good and sufficient deed of conveyance in the law, with the usual covenants in fee simple, free of all incumbrances whatsoever, of building lots numbers eighteen and nineteen on the south side of James' street, being part of park lot number one, being composed of a part of lot twenty-three, in the broken front concession of the township of West Oxford, containing by admeasurement half an acre," then the obligation to be void. *Averment*, that the plaintiff did pay and assign to defendant the said five shares of £25, amounting to £125 of said stock, but that defendant would not, though often re-

quested, make, &c. to plaintiff, a good and sufficient deed of conveyance in the law, with the usual covenants in fee simple, free of all incumbrances, of the said lots, upon plaintiff's request, and at his costs and charges, within three months, though plaintiff tendered such deed to the defendant for execution.

*Pleas 1st. Non est factum.* 2nd. That defendant did within three months, to wit, on 1st of December, 1856, make, execute and deliver to plaintiff, a good and sufficient deed in the law, with the usual covenants freed from all encumbrances. 3rd. That plaintiff assigned the bond to one George Matthews, together with his interest in the lots, and after such assignment, and after breach of the condition, and before the commencement of this suit, the said G. M. gave further time for the execution and delivery of the deed by defendant, until 12th of February, 1857, and that on that day defendant made and delivered a good and sufficient conveyance in the law, with the usual covenants in fee simple, free from all incumbrances, of the said lots, which deed was accepted in full satisfaction and discharge of all damages occasioned by the breach. 4th. Denial that plaintiff tendered a deed to defendant for execution. Issue taken on the 1st, 2nd and 3rd pleas, and replication to the 4th plea; that defendant, at the expiration and during the whole period of three months, had not the power to convey the land to the plaintiff in fee, free from all incumbrances, he, the defendant, having already charged and encumbered the same with the payment of a large sum of money, and which charge, &c., was upon the lands up to the commencement of this suit, i. e., 12th of February, 1857.

This case was tried at London, in November last, before *McLean, J.* For the plaintiff it was proved, that by direction of George Matthews, a deed of bargain and sale of the lots in question, with full and general covenants, conveying these lots to plaintiff in fee, was tendered on the 9th of February, 1857, to defendant for execution, but that defendant declined to execute it, stating that he had given a deed with limited covenants, that there was a mortgage on the premises, but that he would get it discharged so far as

these lots were concerned. The bond was produced at the trial, and seems to have been admitted, but no reference is made as to its language. It appeared that the defendant had, on the 13th of December, 1856, executed a mortgage in fee simple, upon these lots with some others, to secure the payment of £126 6s. 1d. to one David Smith, and upon the 10th of February, 1857, David Smith, in consideration of five shillings, released to defendant the mortgage so far as it affected these lots. The plaintiff also gave in evidence, which was objected to, but was received by the learned judge, a paper dated "Registry office, County of Woodstock, January 19th, 1857, 2 o'clock, p.m.," and signed "C. H. Whitehead, Deputy Registrar." It was headed thus:—"Registered conveyances on Macklem and Street purchase, from Peter Carroll, from his deed to them, down to the present time, title supposed to be good in Mr. Carroll." It contained several columns, for the number of the memorial, the nature of the instrument, its date, the date of registry, grantor's name, grantee's name, quantity of land, remarks, &c. One line, written under the several appropriate headings was as follows: "8146. Mortgage, 30th September, 1853; 17th May, 1854, Macklem and Street and wives; Peter Carroll 250 acres, £1500." Another line was "14803. B. & S., 13 December, 1856. 17th January, 1857, David Smith and wife, Neil McKay, 5 acres, 3 roods, 34 perches, lots numbers one and two, west side of Ingersoll-street," and a third line was "14804. Mortgage, December, 1856. 17th January, 1857, Neil McKay and wife, David Smith, 5 acres, 3 roods, 34 perches. 1-2.—Amount £126 6s. 1d." The plaintiff's object in producing this paper was to prove that the lots which defendant bound himself to convey were part of the 250 acres mortgaged by Macklem and Street to Peter Carroll for £1500. Similar entries shewed Peter Carroll had conveyed to Macklem and Street, and that they had conveyed nearly twenty-four acres to David Smith. It was also proved that defendant executed a deed in pursuance of the act to facilitate the conveyance of real property, dated 24th December, 1856, conveying to George Matthews in fee, the two lots eighteen and nineteen on an alleged con-

sideration of £125, with covenants against his own acts. The parties seem, at the time the defendant refused to execute the deed tendered to him (on 9th February, 1857), only to have been aware of the defendant's mortgage to Smith. For the defendant it was objected, that there was no legal evidence of any incumbrance on the land, and secondly, that the deed tendered to defendant for execution, did not contain a correct description of the land to be conveyed, and did contain unusual covenants. These objections were overruled, and the jury found for the plaintiff and assessed damages on the breach at £120, the full penalty of the bond.

In Michaelmas Term, *D. G. Miller* obtained a rule *nisi* to set aside the verdict, and for a new trial, on the ground that the verdict was against law and evidence, and for excessive damages, and for misdirection in leaving to the jury to find damages on account of the supposed incumbrances in favour of Peter Carroll.

*Becher*, Q. C., shewed cause. He admitted the offer of the deed with limited covenants, but justified refusing and treating it as a nullity on the ground that the terms "usual covenants" gave the plaintiff a right to insist on general covenants for title. As to the admission of improper evidence he stated that there was a consent at the trial on the part of the defendant's attorney to admit the certificate of the registrar as evidence of the facts it states, and that the certificate was made evidence by statute 13 and 14 Vic., c. 19, s. 4. He also objected to the form of the rule for not setting forth the ground of objections relied upon.

No one appeared to support the rule.

DRAPER, C. J., delivered the judgment of the court.

The rule *nisi* has not been filed, nor the copy served upon Mr. *Becher*, and as he shewed cause to it first, and only took the preliminary and formal objection after discussing the case on the merits, I think he must be considered as having waived it; though I wish to be understood, that if taken at the proper time, the objection rested on the plain words of the 168th clause of the C. L. P. Act, 1856, could not have been got over.



As to the term "usual covenants," it has long been settled that where the vendor is the actual purchaser of the estate for valuable consideration, he is not bound to enter into covenants extending beyond his own acts. Lord *Eldon* in *Browning v. Wright* (2 B. & P. 22) thus states the law—"If a man purchase an estate of inheritance and afterwards sell it, it is to be understood *prima facie* that he sells the estate as he received it, and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his own acts and those of his ancestor, and if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. In fact, he says, I sell this land in the same plight that I received it, and not in any degree made worse by me."

The objection to the limited covenants contained in the deed executed by defendant, dated 24th December, 1856, was not that defendant was not himself a purchaser for valuable consideration, or that he took the estate by descent or devise, but that the plaintiff claimed a right to have general and unrestricted covenants from him under any circumstances, and so it was treated on argument. The authority above cited, and the uniform practice and opinion of conveyancers in England, is to the contrary, and shews that the objection to the limited covenant was without legal foundation. It does not even seem to have been known that at the date of the defendant's deed (24th December, 1856,) the lots were subject to a mortgage executed by the defendant himself, about ten or twelve days previous. But though this would have subjected the defendant to an action, as constituting a breach of the condition of the bond, yet inasmuch as that mortgage was discharged before this action was brought, and as the deed was not refused on that ground, I think the plaintiff could only have recovered nominal damages.

But though the objection resulting from the defendant's own mortgage of the 13th December, 1856, might receive this answer, it is obvious the plaintiff was not bound to take the title subject to a previous incumbrance, and if there were legal evidence of that incumbrance, there might be difficulty

in granting a new trial. The objection of the inadmissibility of the registrar's certificate was taken at the trial, and it does not appear to have been met with the answer that it was admitted by consent; and there is this further difficulty that it is not very clear that the certificate shews by itself, that the 250 acres subject to the mortgage of £1500 include these two building lots, though very probably it is so.

It is quite clear, I think, that this certificate was inadmissible under the statute 13 & 14 Vic., ch. 19, sec. 4, which relates to copies of any official documents, or to copies of any document by law, rule, regulation or proceeding, or copies of any entry in any register or other book of any corporation, but does not extend to copies of deeds or memorials in a registry office, and still less to a paper like that produced, which is at best an imperfect abstract, or possibly a copy from portions of the index of the registry books. It might be found difficult to decide how far it would go in evidence, even if admitted upon some (in the present case uncertain) understanding. The certificate which is made evidence under the registry acts, is of a very different character, it relates to acts done by the officer.

We cannot, however, help feeling that if the fact be as we may surmise it is from this document, in the event of our granting a new trial, the plaintiff may still sustain his action proving that the land which the defendant bound himself to convey free of all incumbrances, was incumbered, and that he was not therefore bound to take the title, and if it was clear that the plaintiff had a right to recover the penalty of the bond, we might well hesitate to send the case before another jury, who would probably upon clear evidence arrive at the same result.

It seems not to have been noticed, certainly not by the defendant's counsel, that the literal terms used in the bond treat the price to be paid for the land as "*twenty-five pounds in stock in the Buffalo, Corning and New York railroad, being five shares at twenty-five pounds each.*" It certainly might be the case, that the five shares of stock were worth only £25, in which case the defendant would not be liable for so large a verdict, for his liability, if not limited to £25,

would, I apprehend, depend on the fair market value of the stock, or the value of the land to be conveyed at the time of the breach of the condition, not less than £25, nor exceeding the penalty. There is in all probability an error in the bond and the words "one hundred and," have been casually omitted. The defendant himself by inserting £125 as the consideration in the deed he tendered, has placed the right construction on the bargain, and I do not consider that we should interfere for the purpose of enabling him to raise hereafter a question, which he overlooked or waived at the trial, and on moving the rule *nisi*.

We think, however, that justice may be better satisfied by allowing the case to be submitted to another jury. We do not see that there was any legal evidence of the existence of the larger mortgage, and as the mortgage which defendant had given was released before action brought, and a deed with the ordinary limited covenants executed by defendant, we hardly think it safe, without some further inquiry, to allow this verdict for £120 to stand.

We make the rule absolute for a new trial on payment of costs.

## INMAN V. THE BUFFALO AND LAKE HURON RAILWAY CO.

### *Common carriers—Fire.*

The defendants as common carriers undertook to carry goods of the plaintiff, who resided at Port Dover, from Buffalo to Caledonia, whence plaintiff was to take them. Upon their arrival at the Caledonia station, the customs duties not having been paid, and no one being in readiness to receive them, they were placed in a bonded warehouse, and whilst there were destroyed by fire.

*Held* that the defendants were not liable for their loss, and that their duty as common carriers was ended on the deposit of the goods in the bonded warehouse.

The principle decided in the case of *O'Neill v. The Great Western Railway Company*, 7 U. C. C. P., affirmed.

DECLARATION states that defendants being common carriers for hire, received from plaintiffs certain goods to be carried by them, from Buffalo, in the State of New York, to the village of Caledonia, in this province, and there to be delivered to plaintiff, for reward to them in that behalf.

*Breach*, non-delivery. There is a second count in trover. *Pleas*, 1st. Not guilty; 2nd. That defendants are proprietors

of the Buffalo and Lake Huron Railway, extending from Fort Erie to Goderich, and used by them for the carriage and transportation of passengers and goods from places and way stations on the railway to other places and way stations thereon; that they received the said goods to be carried from Buffalo, to a certain railway station, to wit, the village of Caledonia, and there to be delivered to plaintiff, on payment of freight and charges; that they conveyed the goods safely to Caledonia, and were then and there ready and willing to deliver them to plaintiff, and upon the arrival thereof at Caledonia, they gave the plaintiff notice by sending to him through the post office an advice note directed to him, at Simcoe, notifying him of the arrival of the goods, requesting him to take them away, and that the goods, while remaining at Caledonia, were at this risk; that neither plaintiff, nor any one on his behalf, was ready to receive the goods, whereupon defendants, according to their custom, whereof plaintiff had notice, deposited the goods safely in the storehouse to keep till plaintiff should fetch them away; that after a reasonable time had elapsed for the plaintiff to take them away, and while the goods remained in the storehouse waiting the plaintiff's order, the goods were destroyed by fire, without any negligence of defendants, and thereby, and from no other cause, became lost to the plaintiff. 3rd. Admitting the receipt of the goods as in the former plea, and stating their being safely carried to Caledonia, and defendants' readiness and willingness to deliver them to plaintiff, and that neither plaintiff nor any one for him, was ready at Caledonia to receive the same—sets forth, that defendants, for the benefit and accommodation of plaintiff, and without a fee or reward, deposited the goods in their warehouse, there to be kept until plaintiff should take them away, and then states that after a reasonable time had elapsed for plaintiff to take them away, they were destroyed as stated in the second plea. Issues.—The plaintiff also demurred to the second and third pleas.

The cause was tried at Brantford, in October last, before *Burns, J.* The amount of the invoice price of the goods was £50 1s. 6d., and the defendants' receipt of them to be carried was admitted.



A Witness called for plaintiff, proved that the plaintiff paid duties on these goods, a little over £7, and that he sent a teamster to Caledonia for them, eighteen miles; that the goods were purchased in New York, and were to be taken from Caledonia by the plaintiff. The defendants were to carry them from Buffalo to Caledonia, and to keep them there until the owners sent for them.

For the defence, it was sworn, that when goods arrived at Caledonia, it was defendants' practice to apprise the owners of the arrival. When the goods are imported from a foreign country and the duties are not paid at Fort Erie, they are put into a bonded warehouse. That these goods arrived in Caledonia, a little before noon on 2nd April, 1857, from Fort Erie, in the custom-house car, under lock, and were put into the customs warehouse. The entry of them on what the witness called the shipping bill (produced,) headed "Merchandise way bill from Buffalo to Caledonia, 2nd April 1857," as related to plaintiff's goods, and their consignment was "W. Inman, Port Dover, C.W., 3 Cas. Hats. R. R. charges \$1.07 and \$1.75, \$2.82," two dollars eighty-two cents for charges paid to former carriers and for the carriage from Buffalo to Caledonia.

The custom house officer unlocked the car, and he alone had the key of the warehouse. On the night of the 13th of April (Monday,) the warehouse and the goods in it were destroyed by fire, supposed to be the work of an incendiary; that the plaintiff was notified by post, by advice note, of the arrival of the goods, either on the 2nd or 3rd of April. After that a second notice was sent by some person who was at Caledonia, and returning to Port Dover, either on the Friday or Saturday; that the defendants do not transmit goods to Port Dover, they carry only to Caledonia, and the goods, for Port Dover remain at Caledonia until sent for. The witness stated that both advice notes bore the same date. The plaintiff admitted the receipt of the second notice, and it was shewn to the witness. He said he could not tell whether it was the first or the second. (Note—if enclosed in an envelope, as to send it by post it *must* have been, and as it *may* have been if sent by messenger, no envelope was

produced.) It bore date April 2nd, 1857, and was addressed to plaintiff, informing him of the arrival of the goods at Caledonia station, and requested him to send for them as soon as possible, as they “remain here at your risk and expense.” In reply, the plaintiff proved that the notice produced, was received about nine o’clock in the forenoon of Saturday, the 11th of April, from a little girl, the daughter of one Sinclair; that plaintiff’s clerk, who ought to have known if any notice came by post, was not aware of any notice but this; that the clerk saw the invoice of the goods from New York (produced,) dated 17th March, 1857, but did not know when it was received by plaintiff. It had on it when produced at the trial, a stamp thus—

indicating the entry of the goods for the payment of duties to have been made on 14th of April, at Port Dover. That it would take from five to six hours to go from Port Dover to Caledonia.

DOVER V. R. April 14, 1857. CUSTOMS
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The learned judge asked the jury, 1st. Whether an advice note was posted to the plaintiff on the 2nd or 3rd of April? They said No. 2nd. Whether there was a reasonable time for plaintiff to take away his goods after he received the notice on Saturday morning, and the occurring of the fire on Monday night? They also said No.

A verdict was then taken for the plaintiff, subject to the opinion of the court.

In Michaelmas Term, *D. B. Read* obtained a rule *nisi* for a new trial on the law and evidence. He stated that he was apprehensive lest the question arising on the verdict as taken subject to the opinion of the court, might not admit of a portion of the defence being taken into consideration.

*M. C. Cameron* shewed cause. He contended that on these pleadings, it was not open to the defendants to bring themselves within the principle of the case of *O’Neill v. The Great Western Railway Company*, and that on the pleadings and evidence the verdict was right, whether the pleas were good in substance as a defence would come up on the demurrer. At present the question before the court was only upon the rule *nisi*, and whether the jury were right upon the evidence in determining the issues raised in plaintiff’s favour.

*Read*, contra, insisted that the defendants need not give notice through the post office ; that they might select any other mode of transmitting it. That the moment the notice was received, their liability as common carriers ceased, even if it was not at an end by the arrival of the goods at Caledonia, and that the evidence clearly shewed that the goods, after their arrival at Caledonia, were under the control and in the custody of the custom house authorities, being subject to duties which were actually included in the verdict, and therefore the plaintiff failed on the plea of not guilty, for the breach was non-delivery, and the defendants had made the only delivery in their power. He cited *Garside v. Trent & Mersey Navigation Co.*, 4 T. R. 581 ; *Story* on bailments, sec. 538, 545 ; *Bourne v. Gatliffe*, 3 M. & G. 643.

DRAPER, C. J., delivered the judgment of the court.

The question arises wholly on the first count, in which the defendants are charged as common carriers. If their duty in that character only required them to deliver at Caledonia, then the third plea should have been found in their favour, or they should have had a verdict of not guilty, because they fulfilled their duty by depositing the goods at Caledonia, in a safe and usual place, and were discharged from further liability in that character of common carriers. *Garside v. Trent & Mersey Navigation Co.* (4 T. R. 581.) *Raphael v. Pickford* (5 M. & G. 551), only shews that on a breach for not delivering at all, the plaintiff may recover for not delivering in proper time. Here, however, the defendants insist that the delivery was complete when the goods were stored at Caledonia. In that respect the case is distinguishable from *Hyde v. Trent Navigation Co.* (5 T. R., 389), where the defendants charged and received the cartage of goods to the consignee's house from a warehouse where they usually unloaded, and where the goods were destroyed by an accidental fire. The evidence we have of their undertaking is to carry from Buffalo to the Caledonia station, and to deliver *there*. The plaintiff's residence and place of business was at Port Dover, eighteen miles from Caledonia, and it is not pretended their duty was to deliver there. A personal

delivery to the plaintiff was no necessary part of the duty, they must deliver at Caledonia, and could only deliver to the plaintiff *there*, by a delivery according to the usual course and practice of their business. The issue raised by a traverse of the breach of non-delivery, is suitable for the admission of evidence of the particular circumstances, which it is contended amount to a delivery. See *Muschamp v. Lancaster, &c. R. W. Co.* (8 M. & W. 421); *Watson v. Ambergate, &c. R. W. Co.* (15 Jur. 448); *Bourne v. Gatliffe* (7 M. & G. 860.) The freight was only charged and chargeable so far as we see to Caledonia, and so it cannot be said the defendants' undertaking extended beyond, so that the goods remained in their hands there with a further duty as common carriers to be discharged, i.e., by delivery at Port Dover, or elsewhere than at Caledonia.

I think, that apart from any special circumstances, or any direct contract, the fair import of the defendants' undertaking, as inferrible from the evidence, is to carry, subject to the liability of common carriers from Buffalo to the Caledonia railway station, and to deposit in some safe place there. The well known nature of their business obliges them to move without any unnecessary delay from one station to another on the railway, and it appears Caledonia is an intermediate station between the termini. But the plaintiff answers, that they were bound to give immediate notice, and that until notice, there was no delivery to him. But when does the notice operate to complete the delivery? It must be either from the time it is sent off, or from the time it is received, or from the expiration of a reasonable time for going to receive the goods after the consignee has got the notice. And this, I presume, was the impression on the mind of the learned judge, or perhaps more correctly speaking, it was to meet this view of the case that he submitted the second question to the jury.

I cannot bring myself to the conclusion, that the delivery is incomplete, until the consignee has received this notice, or until he has had a reasonable time to send for the goods after its receipt. Such an extension of the defendants' liability *qua* common carriers, (and it is in that character they are sued,)



not warranted by any authority I have seen, and it appears to me the reason of the thing is against it. If it be admitted that they were not bound to *carry* beyond Caledonia, that admission I think involves the right to *deliver* there immediately after their arrival. Looking at the nature of their business, that they forward goods from one station to any other by night as well as by day, arriving at various hours, and obliged to depart speedily to avoid interference with other trains using the road, the necessity of immediate delivery out of their cars is apparent, and the terminus of the transport being reached, the duty of common carriers is fulfilled by placing them in a safe place, alike safe from the weather and from the danger of loss or theft, and whatever the responsibility the defendants incurred, if that safe place were one under their own charge and control, it assuredly is not the responsibility of a common carrier.

If therefore notice was necessary at all, the second question presented the matter in an erroneous point of view, for it assumes the continuance of the defendants' liability as common carriers, after the safe delivery of the goods, at the place where they were bound to leave them. And on the facts proved, and on the question left to the jury, I think the verdict wrong, for the plaintiff had no right to continue the defendants' responsibility by delaying for a single hour after he received notice. He might have sent on Saturday or Monday and got his goods. Apparently he did not obtain the custom house permit until Tuesday.

But looking further into the facts of the case, and the goods being dutiable, and known to be so to the plaintiff, I adhere to the opinion given by me in *O'Neil v. The Great Western R. W. Co.*, that the delivery of the goods into the bonded warehouse was a complete delivery, and on that ground I see no necessity for a new trial, but think on the reservation made at the trial, the *postea* should be delivered to the defendants.

*Postea* to defendants.

## SMITH ET AL. V. POWELL.

*Patent right—Infringement.*

Plaintiffs had agreed under seal with one N. for a license to use their patent invention in erecting a certain number of mills at a fixed rate per mill. The defendant's mill was erected by N. according to the plaintiff's patent. and N. charged him a less sum, on the understanding he was to settle the patent fee with the plaintiff. Just before the trial, the defendant paid the plaintiffs their patent fee, and on the trial, claimed the plaintiffs should be nonsuited on the ground that the infringement, if any, had been made by N.

*Held*, that the defendant had infringed the patent and brought himself under the terms of the statute 14 & 15 Vic., ch. 79, as having *made use* of the machinery of the mill without first obtaining the plaintiff's consent.

The declaration set forth letters patent dated 6th December, 1854, granting to the plaintiff Smith the full and exclusive right and liberty of making, constructing, using and vending to others to be used, a new and useful improvement in the construction of portable or stationary steam or water saw mills, for the term of fourteen years. That on the 6th of January, 1855, Smith assigned, sold and set over to the plaintiff Fitch, one half of the right, &c., which Smith had in the said invention, to be held and enjoyed jointly with him, and that after the granting of the letters patent, and after the assignment from Smith to Fitch, and during the term of fourteen years, the defendant infringed the said patent right. The defendant pleaded not guilty.

At the assizes in October last, at Niagara, before *Hagarty*, J., the case came on for trial. The letters patent were produced, and it was proved that the defendant has a saw mill constructed in the manner, and with the improvement stated in the specification to the plaintiff's patent. This was proved by the witness, who put it up in July last. He also proved an agreement under seal, made the 25th of September, 1856, between the plaintiffs and one George Northey, the witness's father, which contained, among other recitals, the following: "And that the said Fitch and Smith had verbally agreed with the said Northey for the building of six mills, under a patent fee of £50 on each mill under that patent," and witnessed, that plaintiffs, for the considerations, &c., did grant to George Northey the privilege within Upper Canada of building six mills under the said arrangement with him, and also of building and selling under a certain

arrangement for seven years, from the 21st of March, 1856, six mills in each year. In consideration whereof Northey agreed to pay to plaintiffs £50 in equal moieties, as a patent fee on each mill so built and sold by him, to be paid in six and twelve months from the finishing of such mill: Northey giving his notes, and giving notice in writing, enclosing the notes to plaintiff, of the time of the completion of such mill. There are other engagements on the part of Northey not material to this case. The mill for defendant was bargained for between him and Northey under the verbal contract recited in the agreement of September 1856. Northey charged defendant £50 less than he otherwise would have done, on the understanding that the defendant was to settle the patent fee with the plaintiffs. During the progress of building this mill the plaintiff Smith was informed of it, by Northey's son, of whom he was making enquiries as to what mills he had built, and he made no objection. On the 16th of October, only three days before the assizes, the defendant paid Smith £50, and took the following receipt:

“Received of Mr. Thomas S. Powell one note of hand, payable in three months from this date, £25, and one payable in six months of £25, it being amount in full of patent fee on his saw mill in the Township of Benbrook.

JAMES B. SMITH,”

Canborough, 16th October, 1857.

On this evidence the plaintiffs only asked nominal damages. The defendant's counsel moved for a nonsuit, insisting that under the circumstances the action did not lie against the defendant, but if at all, against Northey. The jury found for the plaintiffs, 1s., with leave reserved to defendant to enter a nonsuit.

A rule *nisi* was obtained by *Martin* for that purpose in the following term, citing *Chanter v. Dewhurst*, 12 M. & W. 823; *Nickells v. Ross*, 8 C. B. 679. He contended that Northey was a contractor acting for himself in making this mill, and that he was responsible and not the defendant, if there was an infringement of the patent. That to make the defendant responsible for Northey's act, the court must view him in the light of a servant of defendant. On this point he referred to the language of *Rolfe*, Baron, in giving

judgment in *Hobbit v. London and North Western Railway Company*, 4 Exch. 254. He also cited *Stockton v. Rogers*, 1 C. & K. 99.

*Miller* (of Niagara), contra, cited *Gibson v. Brand*, 4 M. & Gr. 179, 189, and referred to the 7th section of 14 & 15 Vic., ch. 79, which enacts that if any person shall make or manufacture for sale any article so invented, or shall make or manufacture or *make use of* any instrument or machinery so invented or specified, the exclusive right of which shall have been secured to any person by patent, without the consent of the patentee *first* obtained in writing, every person so infringing the patent shall be entitled to an action, &c.

DRAPER, C. J., delivered the judgment of the court.

The only hesitation I had was, whether it was possible to uphold this defence under the plea of not guilty. The facts shew, I think, clearly enough that in treating with Northey for the manufacture of this machinery, the defendant was treating with a person authorised by the plaintiff to manufacture according to his patented invention, and who had bound himself to pay a specified royalty or patent right, for every mill he should construct in that manner. I do not think the defendant comes within the principle of *Gibson v. Brand*, where the defendant ordered the article to be made in the manner specified in the plaintiff's patent, that he might *sell* it when so made. The defendant ordered the machinery to be erected, knowing not only the plaintiff's right, but also knowing Northey's arrangement with him, and taking upon himself the payment of such a sum for the patent right, as he might be able to agree with plaintiff for, instead of leaving Northey to fulfil the terms of his contract with plaintiff. By this course. I think he has brought himself within the terms of the statute, and *has made use of* the machinery invented by the plaintiff without *first* obtaining his consent in writing. He has not dealt with Northey as Northey was authorised to deal, and had no permission direct from plaintiff to himself.

I think therefore this rule must be discharged.



## MAITLAND ET AL. V. TYLEE ET AL.

*Agent, liability of—Insurance.*

The defendants, at Hamilton, having undertaken on behalf of the plaintiffs, at Montreal, the disposal of certain teas belonging to the latter, and not having succeeded, were directed by them to return the teas to Montreal. The defendants caused the teas to be shipped on board a steamboat bound for Montreal (without effecting any insurance thereon,) which was lost on her voyage, but the defendants did not advise the plaintiffs of such shipment till after the goods had been lost. *Held*, under the circumstances of the case, that the defendants incurred no legal liability to damages for not having given the plaintiff earlier advice, and so as to enable them to have insured the teas.

DECLARATION states that the defendants were retained for reward to sell and dispose of certain goods of the plaintiffs, and for that purpose had received possession of the goods; and defendants were directed that if unable to sell such goods they should return the same to the plaintiffs in Montreal, and it thereupon became and was the duty of defendants, as such agents, to use due care about returning such goods, and to advise plaintiffs when such goods were shipped on return, in a reasonable time thereafter. Averment, that defendants shipped the same goods by a vessel from Montreal, which was lost by perils of the navigation, with the goods on board, and the goods were wholly lost. Yet, defendants took such little care about the return of the goods that they did not advise the plaintiffs thereof within a reasonable time, and plaintiffs had no notice thereof, whereby they were prevented effecting an insurance on the goods, whereby, and by, and through the mere negligence and carelessness of defendants, and their servants in that behalf, the goods were wholly lost to the plaintiffs.

*Pleas*—1st. Not guilty. 2. That defendants were not retained to sell and dispose of such goods, nor did they receive possession thereof for that purpose.

The case was tried before the Chief Justice of Upper Canada, in May last. It is stated on the notes of the learned Chief Justice, that a letter from plaintiffs to defendants dated 16th September, 1856, was produced, from which it appeared that the plaintiffs had sent to the defendants 58 half chests of tea, to be sold on commission. An invoice was also put in of 58 half chests of tea, consigned to defendants

for sale, and returns on account of Edward Maitland Tylee & Co., amounting in the whole to £338 4s. 6d., including an insurance on £300, equal to £5 5s. It was admitted by defendants, that they had sent in September, 1856, the whole of plaintiffs' tea to be sold by auction. Only 10 half chests were sold, and defendants by telegraph informed plaintiffs of the price brought, on which they directed the sale to be stopped. In November, about the 20th, the defendants delivered the remainder of the tea to Messrs. Routh & Co., Wharfingers, at Hamilton, to be shipped to plaintiffs at Montreal, according to an understanding between the plaintiffs and defendants, that if one Murphy did not purchase it should be returned to Montreal. Routh & Co. shipped the tea on board the steamer "Lord Elgin," and immediately advised the defendants of it, informing them also, that as no consignee in Montreal had been named, they (Routh & Co.) had shipped it to Hooker, Jacques & Co., Montreal, and requested defendants to advise to whom to deliver it. It appeared, however, by the production of defendants' shipping order that this was a mistake, and that the names of the proper consignees had been given. The "Lord Elgin" left Hamilton on the 27th November, and was wrecked on the night of the 2nd December, 1856. Only 21 of the half chests of tea were saved, and these so damaged, that, all charges deducted, they produced only £7 12s. 2d. On the 6th December, 1856, the defendants wrote to the plaintiffs giving them the account sales of the ten chests, and informing them that the remainder was on the 19th of November sent to Routh & Co., to go by the first of Hooker, Jacques & Co.'s steamers to Montreal, that it was sent off per steamboat "Lord Elgin" on the 27th November; that the steamer had been wrecked on Long Point, but they had no particulars of the extent of damage to vessel and cargo, and the letter informed them of the mistake as to consigning the tea to Hooker, Jacques & Co. This was the first advice the plaintiffs had of its being shipped back, though they looked for its being returned. A clerk of the plaintiffs, who proved the defendants' letter of the 6th of December, 1856, stated that he had no doubt whatever the plaintiffs would have

insured had they known of the shipment of the tea. No charge was made, nor any agreement entered into for commission to be paid by plaintiffs to defendants, but it was stated that it was not usual to enter into any express stipulation on the subject. Mr. Worts, a large commission merchant, proved that the usual course of his business was to advise the consignee of goods shipped by the next mail after the shipment. That on a single transaction like this, commission might, or might not be charged ; he thought there would be a right to charge it. It appeared the defendants had remitted the proceeds of the ten chests that were sold in full, not deducting any commission for themselves ; that before the shipment of the 48 chests from Hamilton, they had directed their clerk that no charge was to be made for their services, and none in fact was made except for actual outlay. They were not commission merchants. Two witnesses for the defence stated their opinion that there was no custom of trade here, which made it defendants' duty to advise plaintiff of the shipment. Another witness called for plaintiff, expressed his opinion that defendants were acting as if commission merchants, and in that character should have advised plaintiffs of the shipment. It was stated that it was a common practice to take open policies on goods, insuring their safe conveyance from port to port, without specifying in what vessel they were shipped, and that plaintiffs might thus have insured the tea without waiting for any advice of the shipment.

The learned Chief Justice left the question as one of negligence to the jury, telling them that though the transaction was one out of the line of the defendants' usual business, they were not necessarily to be considered as gratuitous bailees, that the jury must decide it, considering the possibility that a letter if written and sent off might not have arrived until it was too late, and that even if it had arrived in time, the plaintiffs might possibly not have effected an insurance. He inclined against the liability following as a matter of course.

The jury found for defendant.

M. Vankoughnet in Easter Term obtained a rule *nisi* for

a new trial on the ground that the verdict was contrary to law and evidence, and the weight of evidence, and for misdirection, as to the liability of agents, and the plaintiffs' right to insure, and in expressing too fully his opinion on the question of negligence, instead of leaving it altogether to the jury.

In Michaelmas Term *M. C. Cameron* shewed cause. He contended that defendants were gratuitous bailees, and that they were consequently only liable for gross negligence, and not for omitting to take a step of extraordinary caution to give plaintiff an opportunity of insuring. That it would be as well to contend that it was their duty to insure the tea on plaintiffs' account, though not so directed, as the loss might have happened before the next mail from Hamilton for Montreal would leave. He denied that the question of negligence was at all withdrawn from the jury, though it was accompanied with the expression of doubt if the evidence sustained the plaintiffs case in that respect.

*M. Vankoughnet* in reply cited Story on Bailments sec. 188 ; Story on Agency, sec. 111, and 185 to 199, 208 ; *Davis v. Garrett*, 6 Bing. 723 ; *Callander v. Oelrichs*, 5 Bing. N. C. 58 ; *Russell v. Palmer*, 2 Wils. 325 ; *Wright v. Bigg*, 15 Beav. 592 ; *Silverthorne v. Gillespie*, 9 U. C. Q. B. 414.

DRAPER, C. J., delivered the judgment of the court.

Whether the defendants were entitled under the circumstance or not to charge a commission for their services, it is clear that by the mere undertaking without charge the service requested of them by the plaintiffs, they undertook for the proper performance of it, and would be even as gratuitous bailees liable for gross negligence.

But waiving for the moment the enquiry whether the defendants were, as has been contended on their behalf, gratuitous bailees, it is even in the plaintiffs' view necessary to enquire what duties they were liable to fulfil, either expressly or impliedly for the plaintiffs. The tea originally came into their hands for sale and return on account of the plaintiffs. The re-shipment of any part of the consignment certainly formed no part of the original undertaking, and



admitting them to have accepted the duty implied or expressed in that consignment, it went no further than to sell the tea, and to account for the proceeds. And this state of things continued, until after a partial sale at auction at unsatisfactory prices; and after the refusal of a party, with whom one of the plaintiffs had negotiated, to become the purchaser of the residue. The plaintiffs had directed the stoppage of the sale at auction, and the teas consequently remained in the defendants' hands subject to the plaintiffs' order. Whether insured against fire or not, does not appear, nor is it shewn that there were any directions or understanding upon this point.

In this state of circumstances, the plaintiffs direct the teas to be re-shipped to them at Montreal. No complaint is made as to any undue delay on the defendants' part to send the 48 chests to the wharf for shipment, which was done on the 19th November. The instructions to reship had been given early in November, in Montreal, by one of the plaintiffs to one of the defendants, who was there, but they were contingent on the refusal of the expected purchaser, and no evidence is given of more than a direction to re-ship.

The directions to re-ship put an end to the former commission and duty undertaking by the defendants. And their liability to this action, if it exists at all, must, I apprehend, depend mainly, if not entirely, upon the consideration of what duty results from the fact that they had in their possession at Hamilton these goods, belonging to the plaintiffs', and subject to their order, and were ordered to ship them to Montreal. I pay no attention to the mistake committed by Routh & Co. in consigning the teas to Hooker, Jacques & Co., instead of to the plaintiffs, for that appeared clearly not to have been the defendants' fault. Now, applied to these circumstances, we can derive little or no assistance from any general usages of trade, because this case rather appears to me, as *sui generis*, than as falling within any established usage, neither can we gather any light from the general dealing between the parties on other occasions, for this is apparently an isolated transaction. We must, I think, determine it on its own special circumstances.

Now, there was no obligation on the defendants' to procure an insurance, they were not so directed, and without such direction, I feel no doubt, no duty could arise. If such a duty had arisen, and the defendants could not procure an insurance, then I have no doubt it would have been their duty to advise the plaintiffs of such inability, and so, by informing him of the necessity, give them the opportunity of effecting an insurance elsewhere.

It does not even appear that the defendants were made aware, not merely of the plaintiffs' desire to insure, but that they ever entertained such an idea excepting so far as might be inferred from the fact that they had insured these teas when they were sent up from Montreal. But that inference could have no weight with the defendants, who knew that the plaintiffs expected the teas back if the proposed purchaser declined; that the communication of his determination was to be made, and was made by him to the plaintiffs, and who must, I think, be assumed also to have known that the plaintiffs might have insured the tea by an open policy.

Under these circumstances, I cannot hold, that as a *strict matter of law*, the defendants were bound to do any thing more than they were proved to have done. And that the only question was one of fact, which was properly left to the jury.

I see no ground for the complaint of misdirection. Indeed, I think the rule has inadvertently issued in its present form, for it is at least a novelty to hear a complaint of misdirection, which properly means in point of law, applied to the expression of an opinion on a matter of fact which at the same time is expressly and unreservedly left to the jury.

Nor can I say that I see any reason to dissent from the decision of the jury on the question of fact. Whether we should have set aside a verdict if rendered for the plaintiffs, for myself, I am not now prepared to say, but I find no sufficient ground to disturb the present finding.

I think the rule should be discharged.

## THE CANADA COMPANY V. WEIR.

*Common Law Procedure Act 1856—Notice of title—Ejectment.*

The notice of title required by the 22nd section of the C. L. P. Act confines the claimant to proof of the title therein stated, but leaves him at liberty to defeat by any means in his power the title set up by the defendant, and in like manner the defendant is confined to proof of the title claimed by his notice, but is equally at liberty to defeat (and that without going into his own title) the title set up by the plaintiff.

When, therefore, the plaintiffs, claiming by their notice under a grant from the Crown, had put in evidence such grant, it was competent for the defendant, notwithstanding he had given a notice, claiming a title in himself, as derived from one A., under a lease from the plaintiffs, to rely upon proof of such lease alone as defeating the plaintiffs' title, without proving an assignment to himself.

EJECTMENT for the south-half of lot number sixteen, eighth concession of Storrington. Writ issued 23rd of July, 1857. Defence general. The notice given by plaintiffs was that they claimed title by patent from the Crown. The defendant gave notice that besides denying the title of the claimants, he claimed title in himself under a deed from one George Anderson to him the defendant, holding title from the said George Anderson, and the said George Anderson being lessee of the premises from the Canada Company.

The case was tried at the last assizes in Kingston, before *Richards, J.* The defendant put in evidence a lease from the plaintiffs, of the premises in question, dated the 25th of June, 1857, to George Anderson, *habendum* for ten years from 1st February, 1857, paying £4 10s. yearly rent, containing among other things, a covenant that Anderson would not during the term, grant, demise, assign, or set over the premises to any person without the consent in writing of the plaintiffs. At the foot of the lease was this notice: "In leasing the above-mentioned lot the Canada Company do not undertake to give possession of the same further than by delivery of the lease. The land is disposed of as wild land, and without reference to any improvement which may have been made thereon by squatters or other persons. Should a squatter or trespasser be on the lot the lessee, on receiving the lease, will be in a position to eject him." The defendant further proved a deed poll dated 22nd April, 1854, whereby George Anderson (the lessee above named) in consideration of £25, "remised, released, and for ever quit claim," to defendant,

his heirs and assigns, all his estate, title and interest in the premises.

The plaintiffs' counsel then applied to have Anderson's name placed on the record as joint or as sole plaintiff, which was refused.

The learned judge directed a verdict for defendant, with leave to plaintiffs to move to enter a verdict for them if the court should be of opinion they were entitled to recover.

In the following term *C. Robinson* obtained a rule *nisi* accordingly.

*Henderson* (of Kingston) shewed cause, insisting that the evidence produced by defendant was in strict accordance with his notice, and entitled him to the verdict, and that plaintiffs claiming as grantees of the Crown, could not recover on the ground of a forfeiture of the lease.

*C. Robinson* contended, that this narrow construction of the 222nd section of the Common Law Procedure Act of 1856, would make it work injuriously instead of beneficially, and if it could prevail against the plaintiffs, should by an equal rigour of construction prevail against defendant, who only denies, as regards the plaintiffs' title to recover, that they are grantees of the Crown, and if that be proved, undertakes to prove a title in himself, derived from these lessees, in which he fails, for the deed put in could have no such operation as against the plaintiffs, whatever its effect as regards Anderson. At any rate he asked for a new trial, adding Anderson as a plaintiff.

DRAPER, C. J., delivered the judgment of the court.

The patent from the crown granting the lot to the plaintiffs, was produced at the trial, and their title as grantees of the crown was admitted by the defendant. Apart from any question arising upon the notices of title, the moment their lease to Anderson was put in, the defendant might have closed his case, for it would have shewn the plaintiff had no right to possession. Then do the notices make any difference. The act requires claimants in ejectment to give notice of the value of the title intended to be set up, and confines claimants at the trial to proof of the title stated in the



notice, leaving them, nevertheless, at liberty to defeat by any means in their power any title set up by the defendant. In like manner the defendants in ejectment are required to give notice, that besides denying the title of the claimants, they mean to assert title in themselves, or some other person (stating whom) under whom they claim, and setting forth in what mode that title is claimed, and they are confined at the trial to proof of this title, to the same extent, and in the same manner, that claimants are confined by their notice; defendants are, therefore, as I read the act, equally at liberty to defeat by any means in their power (without going into proof of their own title) the title set up by the claimants, as the claimants are, after the defendants have proved the title set up by them, to shew facts which will defeat it. The apparent object of the legislature was, to save each party the expense and trouble of getting up evidence to meet a case on which the other did not intend to rely at the trial; that each party might be safe in concluding that all he had to do, was to answer the claim of title set forth in the others' notice, with this difference, however, that the claimant must, in the outset, establish by at least *prima facie* evidence, a right to recover in the mode and by the title stated in his notice.

With this view of the effect of the statute, it appears to me that the defendant was at liberty to put in the lease from the plaintiffs to Anderson, by way of answer to their claim to the possession of the premises by virtue of the grant from the Crown; it displaced their claim by shewing they had parted with the only right to the possession which their notice set up. And the defendant might have taken this line of defence without giving any notice at all, for although the 224th section of the Common Law Procedure Act says the party appearing shall, with his appearance, file a notice "of the title he means to set up," yet this must be read in connexion with the 231st and 232nd sections, and taking the whole together, I apprehend a notice from the defendant is only necessary where, besides denying the plaintiff's right to the possession, he sets up a title in himself. At all events he is not driven to prove his title until the plaintiff's case is so far established as to entitle him to recover, in default or failure of such proof.

But when that lease was put in, I think it was competent for the plaintiffs to shew that it was void, no longer in force, that the term had been put an end to, for in such event they would still be entitled to claim as grantees of the Crown. Such evidence would establish the title set up in their notice, it would not be setting up a different title. The evidence of the deed from Anderson to the defendant, did not however prove this, for it was a mere release of the estate of Anderson in the premises, made before the plaintiffs lease to him, and was therefore no breach of the covenant entered into by Anderson not to assign *during the term*. It could not have operated, as between the plaintiffs and Anderson, as a forfeiture of the term, and therefore it left the lease untouched, and the plaintiffs did not shew a right to the possession.

And they obviously consider the lease in force by their application both at the trial and now to make Anderson a joint plaintiff, which if there was a forfeiture would be absurd. If Anderson has no title as lessee, then their is no use in making him a party to this suit. If he has, then the plaintiff can have no right to recover. Perhaps if the action had been originally brought in his name the defendants would not have contested the action, and then he would have incurred no costs of defence. To add Anderson's name now would be unjust to the defendant, and can only be asked to give the plaintiffs the chance of escaping payment of the full costs incurred by defendant.

I think the rule should be discharged.

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### THE GORE BANK V. CRAIG ET AL.

#### *Bill of exchange—Notice—Acceptance.*

Defendant C. had drawn a bill on one S. C., in England, who had no effects, and did not accept, and the bill was protested for non-acceptance and non-payment. Defendant B. was an endorser for the drawer's accommodation. Notices of non-acceptance and non-payment were duly given to the drawer, but notice of non-payment only to the endorser B., who repudiated the liability. *Held*, that B. was discharged by the want of notice of non-acceptance, and that the facts of there having been no effects in the hands of the drawee, and of B. having endorsed for accommodation, made no difference.

DECLARATION against Craig as drawer and Barker as endorser of a bill of exchange for £400 sterling, drawn

upon Skene Craig—Clayhill, Enfield, Middlesex, England, at sixty days *after sight*. Averment of presentment, refusal to accept, protest for non-acceptance, and notice thereof to defendants, and the like averments, as to non-payment. The defendant Craig pleaded a denial of notice of dishonour, and of non-acceptance. The defendant Barker pleaded a denial of notice of non-acceptance, of presentment to the drawee for acceptance, and of notice of non-payment. Issues were joined on all the pleas.

The cause was tried at the last London assizes, before *McLean, J.* The facts of presentment for acceptance, and of non-acceptance, as well as of presentment for payment and for non-payment, were proved by the production of two protests respectively setting them forth. Notice of non-acceptance and of non-payment were duly given to the drawer, but only the latter was notified to the endorser. It appeared that the drawer had no effects in the hands of the drawee, and that Barker had endorsed for the accommodation of the drawer. That Craig had made an assignment for the benefit of his creditors, giving a preference to his accommodation indorsees, but Barker did not sign it when presented to him. When Barker received notice of non-payment of the bill he at once repudiated all liability on the ground of previous laches. It appeared that Craig had informed him that the bill was not accepted, but this was not until the 15th of May. The bill had been presented for non-acceptance on the 11th of March.

The learned judge directed a verdict for the plaintiffs, with leave to the defendant Barker to move to enter a verdict for him if the court should be of opinion that the plaintiffs had lost their recourse against him upon the bill.

In Michaelmas Term *McMichael* moved accordingly, citing *Whitehead v. Walker*, 9 M. & W. 506; *Roscow v. Hardy*, 12 Ea. 434; *Dunn v. O'Keeffe*, 5 M. & S. 282.

*Becher, Q. C.*, shewed cause, contending that Craig gave notice to Barker of the non-acceptance, which was enough, and that the assignment by Craig for the protection of Barker, who was an accommodation endorser disentitled him to raise this defence.

DRAPER, C. J., delivered the judgment of the court.

It clearly was the duty of the holder to present the bill, which was drawn, payable at a certain number of days after sight, within a reasonable time for acceptance, and having so presented it, and acceptance having been refused, it was also clearly incumbent on the holder to give notice to all prior parties. These rules are so well established that it is unnecessary to cite authorities to prove them. And it appears to make no difference that the drawer had no effects in the hands of the drawee, or that indorser put his name on the bill for the accommodation of the drawer. The defendant Baker was therefore discharged for want of notice to him of the non-acceptance, and nothing has been proved as against him sufficient to waive the objection.

*Postea* to defendant Barker.

The Chief Justice referred to the following cases:—*Leach v. Hewitt*, 4 Taunt, 731; *O'Keeffe v. Dunn*, 6 Taunt. 304.

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#### HEATHFIELD V. VAN ALLEN.

*Principal and agent—Authority to sign note.*

It was proved that one D. was clerk or agent for the defendant in keeping a store at L. and that defendant had sanctioned his purchasing certain goods. *Held*, that the circumstances gave no implied authority to D. to sign the defendant's name to negotiable paper, and that the jury were warranted in finding that the defendant had given D. no authority to purchase goods of the plaintiff.

APPEAL from the County Court of the County of Kent.

This was an action brought by the plaintiff to recover from the defendant £34 18s. 9d. for a promissory note and goods sold and delivered by plaintiff to defendant.

Declaration.—First count, on promissory note £17 17s. Second count, *indebitatus*, goods sold, &c.

Pleas.—1st. *Non fecit* to first count. 2nd. *Non assumpsit* to second count.—Issues joined.

The trial took place before the Judge of the County Court, at July sittings, 1857, when a verdict was rendered for the defendant.

Application was made by the plaintiff in the following October term for a new trial, on the ground of the reception of



improper evidence for the defendants at the trial ; that the verdict was contrary to law and evidence and the judge's charge, and upon points reserved.

After argument of rule the court discharged the same.

This appeal was made to the Court of Common Pleas against the decision of the Judge of the County Court, on the rule for a new trial.

The grounds of appeal were, that the evidence given at the trial raised an immediate presumption of law that the agent for the defendant, H. V. Deming, who signed the promissory note, and who received the goods for the defendant, had authority as regarded strangers and the plaintiff, without notice to contract as adduced in evidence, and render the defendant liable : that the question of general or special agency should have been taken out of the hands of the jury : that evidence at the trial was improperly received for the defendant, tending to show special instructions from the defendant to his agent, H. V. Deming, and that such evidence was inadmissible without the defendant first shewing that plaintiff had notice of such instructions.

*Duck* for appellant.

DRAPER, C. J., delivered the judgment of the court.

All that the plaintiff proved in this case, apart from the particular transaction on which this action is brought, is that the defendant had a store at Leamington, kept by one H. V. Deming, where goods were sold ; and the accounts were kept in defendant's name, and were sued for in his name. A letter was also proved, written by defendant to H. V. Deming, dated at Chatham (where I presume defendant lived), 23rd of July, 1856, acknowledging the receipt of \$50, which he placed to the credit of the Leamington store, and containing as follows : " If you can make out an order for a full load of goods I shall send you one forthwith. I am daily expecting a fresh lot of boots and shoes. I expected you had got the crockery ere this. I suppose the goods purchased in Cleveland will have to be paid for at once : if so, all right, if bought cheap enough." A witness proved that he was aware H. V. Deming had purchased

goods in Cleveland, but whether for himself or for defendant the witness did not know.

The plaintiff rested his case as to Deming's authority to sign defendant's name to the promissory note declared on, and to purchase the goods for which it was given, on this evidence. He proved the sale of the goods to Deming and his giving of the promissory note by his own agent, who travelling through the country, went to Leamington, and there had the dealing with Deming.

The plaintiff lived in London. The note was dated on the 17th of July, 1856, payable eighteen months after date.

The defendant put in a bond, dated 30th of June, 1856, from H. V. Deming and his sureties to defendant. After reciting that Deming was to be immediately engaged by defendant to manage and conduct a store about to be established at Leamington by defendant, and that Deming would receive into his possession divers amounts of merchandise, sums of money, goods, chattels, and other things the property of defendant, and that Deming was bound to keep true accounts of his receipts and disbursements for and on account of defendant, the condition was for his faithful accounting, &c. Deming was to receive £150 per annum. He left the country in the fall of 1856 for Illinois, and sold off defendant's goods at auction. It was proved that on one occasion soon after the opening of the Leamington store, a party desired to sell goods to Deming on defendant's account, but he refused to buy, saying he had no authority; and the party applied to defendant, who gave authority to Deming to make the purchase.

It was left to the jury to say, whether Deming had a general or a special authority. If the latter only, to find for defendant. They did so find; and the learned judge refused a new trial, as the above case shews.

It was incumbent on the plaintiff to prove the authority of Deming to sign the defendant's name to negotiable paper, in order to entitle him to recover on the promissory note. But the evidence given by the plaintiff did not shew any such authority in fact, nor any ground to infer it, from the general course of his transactions, for this is the only

instance shewn in which he did so. As far as the evidence shews, Deming was acting merely in the capacity of a clerk to the defendant, and with no implied authority, other than what such employment would give. The plaintiff, therefore, I think, did not give sufficient evidence to entitle him as of right to a verdict for the note. In the papers transmitted by the learned judge the note is set forth as dated on 17th of July, 1856, payable eighteen months after date, and the action is commenced on 16th of April, 1857. It appears the note and the goods are all the same dealing. If so, the plaintiff ought to have been nonsuited.

If there is some mistake in the report, and the credit given has expired, then the next question is, whether, assuming Deming had no authority to sign defendant's name to a note, he had authority to buy goods for him. This was a question for the jury, on the evidence; and I think, on the plaintiff's evidence, the jury were well warranted in their finding.

The last point is whether there was an improper admission of evidence, in allowance the bond given by Deming and his sureties to be produced. I have felt some doubt on this point, as this bond was not the authority under which Deming acted, but a mere recital of it. But for the purposes of shewing that his appointment was that of a quasi clerk, and that he had no special authority beyond that which the ordinary nature of such an employment, and of his usual transactions and dealings in that character would imply, I incline to think it was admissible.

And I think we should not allow the appeal on this ground, even if the evidence were inadmissible, unless the plaintiff had otherwise shewn a case *prima facie* sufficient to entitle him to a verdict.

As I am of opinion he did not, I think the appeal should be dismissed with costs.

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## FOWLER V. HENDRY.

*Interpleader—Fraud.*

Where a trader being in embarrassment, arranged with the plaintiff to supply him with goods as agent, with a right to retain whatever sum he could make over a certain price, and also gave plaintiff a confession of judgment under which execution was issued and the trader's furniture sold, part of which was purchased by the plaintiff, and remained in possession of a brother-in-law of the trader, in the house of the latter, and the *bona fides* of the transaction was proved at the trial solely by the evidence of the trader and his brother-in-law, when a disinterested witness might have been called. The court ordered a verdict for the plaintiff, to be set aside, and a new trial had, on the ground that the ends of justice might be furthered by a second investigation.

INTERPLEADER issue, reciting that certain goods had been seized by the sheriff of Hastings, under an alias *fi. fa.*, in a suit of the now defendant, Thomas Hendry, against Florence Donoghue, John Donoghue and John Regan, which writ was delivered to the sheriff on the 21st March, 1857. And the question to be tried was, whether, at the time of the delivery of the writ, the said goods or any part thereof were the property of the plaintiff as against the defendant.\*

The case was tried at Belleville, in October last, before *Richards, J.* It appeared that John Donoghue, one of the execution debtors, had been dealing for some years with the plaintiff, who is a merchant in New York, and sold to John Donoghue from time to time large quantities of boots and shoes: that pending such dealing, John Donoghue became embarrassed, owing to his having endorsed notes, &c., for Florence Donoghue: the present defendant had recovered judgment against Florence and John Donoghue, and the other execution defendant, on a note of that kind.

John Donoghue was apprehensive that goods which he might purchase on his own account, to carry on his business as before, would be seized to satisfy such debts, and he went to the plaintiff at New York, with one Cook, and it was arranged that the plaintiff should send goods to John Donoghue, to be sold by him on commission for plaintiff, and as agent for plaintiff. John Donoghue to remit to the plaintiff the prices which the latter should fix on the goods, and to retain whatever he could make above that price. It seems that John Donoghue had to pay the charges, duties, &c., though this is not very distinctly shewn. Cook was a son-



in-law of John Donoghue's, and suggested this arrangement to plaintiff and John Donoghue; prior to its being acted on by the plaintiff he had sent forward a supply of similar goods to John Donoghue, but had addressed them to Cook, apparently with no other design than to save them from executions against John Donoghue. Cook never interfered with these goods at all.

John Donoghue had also, before plaintiff sent him goods on comission, signed a confession of judgment in favour of plaintiff, and had executed a bill of sale by way of mortgage to him, with regard to which Cook, professing to act as agent for plaintiff, had made an affidavit of debt, &c., such as plaintiff himself would have been required by the statute to make, but this was not acted upon. But judgment was entered on the cognovit, and execution placed in the sheriff's hands, upon which, and on a prior execution for another creditor, John Donoghue's furniture was sold. Cook was the purchaser, and as he said bought about £64 or £65 worth of it on his own account, for which he paid by his own cheque, and the rest he bought on account of plaintiff; he had a power of attorney from plaintiff, dated November, 1856. Cook was living in the same house with John Donoghue, and the furniture all remained there after this sale. The plaintiff's right to the boots and shoes, sent as contended by plaintiff, to John Donoghue to be sold on commission, as well as to the furniture bought by Cook, at the sheriff's sale, for the plaintiff, and on the plaintiff's execution, was matter in question in this cause.

The whole account as to plaintiff's claim on John Donoghue, and the arrangement made by plaintiff to send him goods to sell on commission, rested almost entirely on the evidence of Cook and John Donoghue himself. It was in part confirmed by the fact that the cases came from New York to Belleville, addressed to plaintiff, John Donoghue agent, and that the latter professedly acting as agent for plaintiff, entered the goods at the custom-house and paid the duties upon them.

The evidence left very little, if, indeed, any room to doubt

that John Donoghue's motive was to evade the payment of the debts for which he had become liable on Florence Donoghue's account, and that Cook was aiding him to the utmost. It appeared that Cook was married to a daughter of John Donoghue, and it appeared that John Donoghue had conveyed what real estate he possessed, by way of marriage settlement, on his daughter, so that one way or other there was nothing, after the sale on the execution, where Cook purchased, apparently liable to satisfy John Donoghue's liabilities. John Donoghue swore that he had paid for all the goods he bought from plaintiff, before this arrangement for selling on commission. He stated that he opened new books for this business, but kept no cash book, nor any particular account of money which he took for his own use from the till, and he had not rendered any account sales to plaintiff for the goods.

The learned judge directed that a party might send goods to an agent to sell for him, and would not lose his right of property because the goods were in the agent's possession. That the question was, whether the plaintiff had in this way sent the boots and shoes to John Donoghue, or whether he had in fact sold them to him, but lent himself to the pretext of a dealing by commission, in order to protect the goods from being seized by John Donoghue's creditors. In like manner, if the furniture was *bona fide* sold under execution to satisfy a just debt, the plaintiff would not lose his right of property by the articles remaining in the house where John Donoghue and Cook lived, but if the confession of judgment was fraudulent, and made to cover John Donoghue's goods by a seizure and sale founded upon it, it would be nugatory.

The jury found for the plaintiff.

In michaelmas Term, *Henderson* (of Belleville) obtained a rule *nisi* for a new trial, on the ground that the verdict was against law and evidence, and against the weight of evidence. *Walbridge*, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the court.

I should readily concur in a new trial, if my learned bro-

ther who tried the cause, expresses himself dissatisfied with the verdict. There can be no doubt as to the motive which influenced John Donoghue and Cook ; their obvious design was so to place John Donoghue's property and effects that his creditors should be unable to reach them, and enough was proved to shew that they contemplated in this way to drive those creditors into accepting a composition. There is also no reason to doubt, not only that the plaintiff understood this was their motive, but that he lent himself to the design ; even assuming that from that time, instead of selling goods to John Donoghue, he entrusted goods to him to sell upon commission. But while, on the one hand, this is calculated to raise a suspicion very unfavourable to the *bona fides* of the plaintiff, and thereby to make it doubtful whether this employment of John Donoghue as a commission agent for plaintiff was not merely colourable, and a device to enable him to defeat his creditors ; yet, on the other, it must be remembered, that if he was made fairly aware of John Donoghue's liabilities, and of the almost certainty that any goods sold to him and sent as his property to Belleville, would be immediately seized and sold on executions, it is hardly to be supposed that he would, without any security, sell and deliver goods to him. It is more probable that if he had personal confidence in him, and was desirous of enabling him to maintain his family, he might adopt Cook's suggestion in good faith, as a mode by which, without any other risk than a want of integrity in John Donoghue, he might continue to deal with him.

It is very unsatisfactory to find the plaintiff's conduct and intentions are only before us on the evidence of Cook and John Donoghue, while another person, a clerk of his own, seems to be cognizant of the transaction, and might be able to clear up the doubts which overhang the matter. If the jury had heard his evidence, and had then found for the plaintiff, I should have felt much greater difficulty in disturbing the verdict.

As it is, my brothers are of opinion the case should undergo a second investigation, and I agree with them in granting a new trial. Costs to abide the event.

## COOK v. HENDRY.

*Interpleader—Evidence—Fraud.*

Plaintiff was son-in-law of one J. D., and lived in the same house, using half the same shop, and it was clearly shewn that the plaintiff and J. D. had made certain arrangements with the express object of putting J. D.'s property out of reach of certain creditors. Part of the evidence admitted for this purpose was a settlement of J. D.'s real estate prior to plaintiff's marriage with his daughter. In an action to try the title to certain goods alleged to have been purchased by plaintiff at a sheriff's sale of J. D.'s goods, it appeared that the purchase money paid by plaintiff had been credited to him out of sums payable by plaintiff to another estate, and in fact went in relief of the claims on J. D. *Held*, first, that evidence of the settlement was admissible. Second, that the jury rightly found against the plaintiff's claim.

INTERPLEADER issue reciting that certain goods had been seized under a writ of *alias fieri facias* in a suit of the now defendant, Thomas Hendry, against Thomas Donoghue, John Donoghue, and John Ryan, by the sheriff of Hastings, which writ was delivered to the sheriff on the 21st day of (March ?) 1857, and the question to be tried was, whether, at the time of the delivery of the writ the said goods or any part thereof were the property of the plaintiff as against the defendant.

The case was tried at the autumn assizes at Belleville, before *Richards, J.*

The plaintiff's title to the goods was derived thus: first, as to a quantity of boots and shoes; that he had purchased them in Montreal on his own account, and had delivered them to John Donoghue, above named, as one of the execution debtors, to be sold by him on commission, and as agent for the plaintiff; and second, as to certain furniture claimed, that he had purchased it at a sheriff's sale on an execution against the goods of John Donoghue for his own use and benefit. It appeared that the plaintiff and Donoghue lived together in the same house; that each carried on business, in what was in reality one shop, but was divided by a sort of partition consisting of boxes or tea-chests; and that the boots and shoes in question were seized, part, in plaintiff's portion of the shop, and part in that used by J. Donoghue. The plaintiff was married to a daughter of J. Donoghue's. Just before this marriage, he conveyed all his real property to a trustee by way of marriage settlement for his daughter. The plaintiff told the trustee, who was unwilling to take the



conveyance, that he (the trustee) would run no risk; the difficulties would be arranged in a little while, and then it would all go back to John Donoghue, and the lattersaid he wanted to put his property into such shape that it could not be seized and sold for the debts of Florence and himself; that he thought he could settle on easy terms: 5s. or 10s. in the pound; and after they got these debts wiped off, he John Donoghue was to get the property back again.

It appeared that John Donoghue had been carrying on business for several years, and apparently was doing well; but that he endorsed for his brother Florence, who had failed, and it was on a liability thus originating that the defendant's execution was founded.

The defence was, that the boots and shoes were not the property of plaintiff at all. John Donoghue swore that in November, 1856, he let the plaintiff have \$250 in cash; that it was, as he thought, after plaintiff had consigned the boots and shoes to him; that the money was given to plaintiff to relieve his goods from execution on a responsibility incurred on account of Florence Donoghue, and was never returned by plaintiff; that John Donoghue took it out of moneys he received for goods he was selling on commission. J. Donoghue said, that as he was out of that description of goods he told plaintiff so, and that plaintiff, who was then going to Montreal, brought them there, and sent them up to him. This was in November, 1856.

It further appeared that when Florence Donoghue's difficulties became pressing he made an assignment of his property and debts to his brother John, who afterwards assigned the same to William Donovan—Florence Donoghue's son-in-law, to protect John Donoghue, for his endorsements. By some arrangement not very clearly explained, an auction (at least in form) took place, attended by very few persons, when the plaintiff became the purchaser of Florence Donoghue's effects, and gave four notes for £231 2s. 10d. each, payable at 6, 12, 18, and 24 months. These notes were lodged with Mr. Holden, the agent for the Bank of Upper Canada at Belleville, and were drawn, payable with interest, to William Donovan or bearer. A memorandum was drawn

up at the time as follows: "By the agreement made the 14th of May, 1856, between William Donovan, assignee of the estate and effects of Florence Donoghue and E. F. Cook, purchaser of the said estate and effects, four promissory notes dated this day, each for the sum of £231 2s. 10d., at six, twelve, eighteen, and twenty-four months respectively, were given on the said purchase, and agreed that these notes should be deposited with Erastus Holden, Esq., agent of the Bank of Upper Canada, to be held by him until they were respectively paid. E. F. Cook, the purchaser aforesaid, is not to pay the amount thereof to the said Donovan, but to the respective creditors of the said Florence Donoghue, and upon his producing the receipts of any such payment to the said Erastus Holden, he is to endorse the amount of the said receipt on the note; thus endorsing the amounts paid from time to time until the notes are all paid up, when the said E. F. Cook is to be entitled to take up the same as fast as they are respectively paid up. Creditors, John Machider, T. Hendry, Waldran, Page & Co., New York, Hugh Fraser, Smith & Patterson, Kingston, Commercial Bank, Belleville."

John Machider obtained judgment and execution against Florence and John Donoghue, and issued an execution, which was the first. The amount, including sheriff's fees, &c., was £66 14s. 10d., and John Donoghue's piano and other furniture was seized and sold under it. The plaintiff purchased the furniture he now claims on that occasion, (excepting one bureau, which he bought from another person and paid for), and paid the sheriff the amount. But according to the testimony of several witnesses, he claimed to have credit for this amount upon the promissory notes deposited with Holden, as having by that payment discharged one of the debts due by Florence Donoghue, and mentioned in the agreement. And if so, then the payment was a satisfaction of so much of the purchase money of Florence Donoghue's effects, and could not also be the purchase money paid by plaintiff for John Donoghue's furniture seized under the execution, though the effect of the payment would be to relieve that furniture from the execution, and so in effect to restore it as his own property to John Donoghue, in which case it was liable to seizure under the defendant's execution.

The learned judge left to the jury to decide on all this testimony whether the boots and shoes and the furniture were the plaintiff's property, and they found that, with the exception of the bureau, it was not, and with that exception. rendered a verdict for the defendant.

In Michaelmas Term, *Walbridge*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence and for misdirection, renewing an objection he had taken at the trial as to the admissibility of the evidence respecting the settlement of John Donoghue's real estate on his daughter, the wife of the plaintiff.

*Henderson* (of Belleville) shewed cause.

DRAPER, C. J., delivered the judgment of the court.

I am of opinion that the verdict was right, and that there was no misdirection either in the reception of the evidence objected to or in leaving it to the jury."

It was material to the subject matter in dispute whether John Donoghue and the plaintiff had not entered into an understanding that all the property of the former should be so disposed of; that there should be nothing which any of his creditors could obtain satisfaction from, the object of such understanding being, according to the evidence; to enable them to coerce J. Donoghue's creditors into accepting a composition. The first step in this transaction was the so-called marriage settlement, and if it were shewn that it was made as a fraudulent cover for so much of John Donoghue's property, and that plaintiff was a party in procuring it, it would go a long way in throwing light upon subsequent transactions calculated to bring about the same result. It was one link in an alleged chain of fraud, and its character affected the character of the other transactions which formed other links in the same chain, and, as part of a general fraudulent design, was admissible to prove the fraudulent character of the whole.

Then, as to the boots and shoes, the evidence of John Donoghue, who was called for the plaintiff, shewed that he had advanced to the plaintiff a sum closely approaching the cost price of these goods in Montreal. That he had not

paid it so far as he could state on any account, except for plaintiff's accommodation to relieve him, and it never had been repaid. The account given by Donoghue of this transaction was exceedingly vague, and there really was nothing to shew that the plaintiff was at that time under any pressure on account of Florence Donoghue's debts, which was the only suggestion John Donoghue could offer in explanation. Looking at all the circumstances, I think the jury might very well arrive at the conclusion that this sum of money was paid on account of the boots and shoes now claimed. The plaintiff does not file any affidavit explanatory of the transaction.

As to the furniture, the case is still clearer. The plaintiff is in fact trying to make the money paid by him in satisfaction of Machider's execution, answer two purposes. First, to pay so much of his debt due on the purchase of Florence Donoghue's effects, and second, to pay for John Donoghue's furniture, and so make it his own. I think the jury have rightly dealt with such an attempt.

In my opinion the rule should be discharged.

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### CAMPBELL V. HOWLAND.

#### *License—Revocation.*

The defendant, by an instrument in writing, agreed with the plaintiff to take a certain saw mill according to the terms of a certain lease, and with a provision that the defendant was to take the pine off the land known as the Sammis lot first, as the said plaintiff *was bound* to take off the same. The plaintiff subsequently purchased the fee simple of Sammis's land. *Held*, that the plaintiff was entitled to revoke any license implied by such agreement, and to maintain an action of trespass against the defendant for removing from the lot formerly owned by Sammis, pine and saw logs, after he had received notice forbidding such removal.

The declaration (filed 24th October, 1856) charged: 1. That defendant broke and entered the south-west half of lot No. 8, 2nd concession of Reach, and cut down and destroyed large quantities of trees there growing, and took and carried them away. 2. That defendant wrongfully converted to his own use, and deprived plaintiff of 10,000 saw logs. *Pleas*: 1st. Not guilty. 2nd. Leave and license. 3rd. Plaintiff not possessed of the goods.



The issues were tried before the Chief Justice of Upper Canada, at Whitby, in November, 1856. The plaintiff proved that a number of saw logs, exceeding 600, were cut by defendant's order on this lot, No. 8, known as the Sammis lot. During the time they were being cut, about December, 1855, the plaintiff's son forbade the cutting, saying that he owned the place. A deed was put in and proved by the plaintiff, bearing date 5th February, 1852, from one Macaulay, conveying the lot called the Sammis lot, to the plaintiff in fee.

For the defence, an instrument in writing, signed by both parties, but not sealed, and dated 1st January, 1850, was put in, whereby defendant agreed to take the saw mill on lot No. 24, 9th concession Whitby, from the "1st day of January next," on the conditions specified in a lease now held by John Campbell, (the plaintiff), for the same; from Peter Perry, only in addition to pay plaintiff \$100 a year during the "whole time above mentioned." Defendant further agreed to do all the alterations required at his own expense, with certain exceptions, and after some other stipulations defendant agreed "to pay 5s. per thousand feet for the pine which may be furnished by the said Campbell, in the woods as it stands or *lays* [lies]. It is understood that the said Howland is to take off the pine off the land belonging to the Sammis, lot first, as the said John Campbell is bound to take off the same; and he said Howland has the privilege to get pine from any other person or persons, provided he may think best, and to leave to pine on the Chapman land to the last."

No other evidence was given, and consequently it did not appear on what terms, or how the plaintiff was bound to take the pine off the Sammis lot. The plaintiff became owner of this lot by the deed of February, 1852, rather more than two years after the date of the instrument put in on the defence.

The learned Chief Justice directed that in his opinion a license to take the pine off the Sammis lot was made out; that the plaintiff could not by purchasing this lot deprive the defendant of the privilege of taking this pine; that the

plaintiff could not revoke the license, and so treat the defendant as a trespasser. That if it had been shewn that defendant had taken the timber from the lot, in such a manner as the plaintiff by his agreement with Sammis could not have done, then the license would not protect defendant, and the plaintiff must know how this was, and did not object on any ground arising from the term of that agreement, but rested his case entirely on the ground of his subsequent purchase of the lot, and that its effect was to destroy the agreement with the defendant about the pine. That treating this writing as a license, it was not revocable because it was coupled with an interest. The jury found for defendant, adding that the defendant should pay 5s. per thousand on which the learned Chief Justice chiefly observed that the defendant was bound by his agreement to do that, but it could not be settled in this action, and there might have been a count for the pine. That as between plaintiff and defendant this payment was the only condition, and if defendant had a right to take them, the stipulation about clearing and taking within a limited time, though necessary under the former circumstances in order to protect the plaintiff against Sammis, was inapplicable as between plaintiff and defendant. The jury on this direction found for defendant.

In Michaelmas Term *M. C. Cameron* obtained a rule *nisi* for a new trial on the ground of misdirection, in ruling that the license given in evidence at the trial was irrevocable.

*Patterson* shewed cause.

DRAPER, C. J., delivered the judgment of the court.

This case would have been disposed of several terms ago, but for the desire of the court to be more fully acquainted with the terms of the conveyance from Macaulay to the plaintiff, of the 5th February, 1852. Last term, the counsel on both sides agreed that it contained nothing material to the points raised on the trial, or at the argument.

It appears to me that this case is not to be distinguished in principle from that of *Beaver v. Reed*, (9th U. C. B. 152.)

The plaintiff shews himself by the deed of February, 1852,

to be the owner in fee simple of the land, being No. 5, 2nd concession of Reach, on which the trees in question were cut by defendant, and converted to his own use. The Plaintiff's son acting under his father's authority, prohibited the act, which was persisted in.

The trespass was committed in December, 1855, and the defendant sets up as a justification of it that by an agreement in writing (not sealed,) dated 1st January, 1855, he agreed to take a saw-mill situate on lot No. 24, 9th concession of Whitby, on the conditions set forth in a lease for the same which the plaintiff had taken from one Perry, and that the agreement contained the following provision: "It is understood that the said Howland, the defendant, is to take off the pine of the land belonging to the Sammis, first, as the said John Campbell (the plaintiff,) is *bound* to take off the same." Except the stipulation in the agreement that defendant should pay 5s. per thousand feet for the pine which might be furnished by the plaintiff, there was no other evidence to sustain the plea of leave and license.

I do not see how it can be successfully contended that any interest in these trees passed to the defendant, unless it could also be maintained that an action would lie for him against the present plaintiff for the trees, because obstructed or prevented from cutting and taking them away.

But for this latter purpose, there must have been a sufficient valid grant, and that can only be inferred in the present case (apart from the objection of the want of a sealed instrument) by converting the contract of the defendant to do an act, apparently for the relief of the plaintiff, into a sale, by the plaintiff to the defendant, of growing timber, with regard to which such act is to be done.

It would in my opinion be difficult to sustain such a construction of the words used if the contract were under seal, and the more so since it appears that the plaintiff's title to the land on which the trees were growing accrued two years after the date of the agreement, and it could only be by estoppel that such a consequence could arise.

The language used as to the trees, "the plaintiff is *bound to take off*," naturally imports some obligation for the benefit

of another, and the contracting with the defendant to do what the plaintiff was *bound* to do, as naturally imports an undertaking by defendant to releive the plaintiff from the obligation to do the act. It may be if the whole of the arrangement between the plaintiff and the then owner of the Sammis lot were known, it might give a different aspect to the transaction. But on the facts appearing we cannot say that it was not an advantage to the owner to have the pine timber which was standing and lying on his land removed, and that he had made an arrangement by which plaintiff became bound to do it, and it by no means follows that the plaintiff became *owner* of the pine because he was bound to take it off the lot, and if not, then it does not follow that the defendant has acquired any interest in it, though he undertook to fulfil the obligation the plaintiff had entered into.

It cannot be said that the plaintiff has used any language by which he represents himself to have a right to dispose of these trees. The language imports an obligation on him to remove them, and an undertaking by the defendant to relieve him from that obligation. If the plaintiff were otherwise discharged from his undertaking, I do not see how the defendant could on that ground complain.

I cannot, therefore, agree, that this is the case of license coupled with an interest. The stipulation that defendant should pay five shillings for every tree furnished to him by the plaintiff, neither came into force, nor gave him a right to any particular trees until the plaintiff did furnish them. *A fortiori* it could not justify him in cutting and taking away trees from the plaintiff's land against his will. If so, his plea is not supported, for he shews no other license than this agreement.

The verdict for the defendant appears to me contrary to law, and must consequently be set aside without costs.

Rule absolute without costs.

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## KIRK V. LONG.

*Seduction—Unmarried Female—Statute 7 Wm. IV., ch. 8.*

A "widow" is not within the meaning of the term "unmarried female," as used in the statute 7 Wm. IV., ch. 8, and her father cannot maintain an action for her seduction, when she was not living in his service, but in that of her seducer.

DECLARATION, that defendant debauched and carnally knew one Charlotte Chapman, the daughter and servant of the plaintiff, whereby, &c.

Pleas.—1. Not guilty. 2. That the said Charlotte was not the daughter or servant of the plaintiff.—Issues.

The trial took place before *Draper, C. J.*, at the last Toronto assizes. Charlotte Chapman stated she was the plaintiff's daughter, and was married in England about ten years ago: that she came to this province about four years ago. Her husband died on the passage out, but she came on with her brother. Shortly after coming here she went to live at the defendant's house as housekeeper. Defendant was a widower, with a family. While living with him in this capacity, he seduced her, and she had a child by him, which died on the 17th of August last, being eleven months old. The plaintiff lives in England, and has never been in this country. For the defence it was objected, that the action would not lie, under our statute, because the daughter was married; nor was it sustained at common law, for there was no proof of service. The learned judge recommended the defendant's counsel to let the cause go to the jury, reserving leave to him to move to enter a nonsuit. This was declined. He then directed that the case was not within the statute 7 Wm. IV., ch. 8; and that although the fact that the daughter was a widow constituted no objection to her father's maintaining the action at common law (*Harper v. Luffkin*, 7 B. & C. 387); yet it was necessary to prove service to sustain the action, apart from the statute, and that in the present case the daughter was, not only not in the actual service of the plaintiff, but she was living in the service of the defendant at the time of the seduction. The jury however found for the plaintiff, with £150 damages.

In Michaelmas Term *J. Duggan* obtained a rule *nisi* for a

new trial, on the ground that the verdict was contrary to law and evidence and the judge's charge.

*Eccles*, Q. C., shewed cause. He insisted that the fact that the daughter had been married made no difference in the application of the statute. The father of an unmarried female, though living in England, can maintain this action under the statute. A widow is within the true sense of the term, "unmarried female," as used in the act. He admitted the action could not be sustained at common law, because the daughter was living with the seducer at the time.

DRAPER, C. J., delivered the judgment of the court.

The statute of Upper Canada, 7 Wm. IV., ch. 8, entitled, "An act to make the remedy in cases of seduction more effectual, and to render the fathers of illegitimate children liable for their support," in the first section enacts, "that the father, or in case of his death, the mother of any *unmarried* female who may be seduced after the passing of this act, and for whose seduction such father or mother could sustain an action in case such *unmarried* female were at the time dwelling under his or her protection, shall be entitled to maintain an action for seduction, notwithstanding such *unmarried* female was at the time of her seduction serving or residing with any other person upon hire or otherwise. By section two, "Upon the trial of any action for seduction, brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary." Third section is applicable only to the case of seduction of an unmarried female, but it seems to shew that in such case the father or mother cannot maintain the action under the statute, unless resident within the province at the time of the "birth of the child which shall take place in consequence of such seduction;" for it makes provision in that event for the action being brought by any person entitled to maintain it at common law.

If the word "*unmarried*" were not in the first clause of the statute, no doubt the action would lie. That word

would not have been repeated three times in that section, unless to mark emphatically how far the legislature meant to go beyond the rules of the common law, in enabling a father or mother to maintain an action for seduction. But for that word, I do not at present see that, taking the next section of the act in connection with the first, the seducer of a married woman would not be liable, under this statute, to an action by her father or mother, as well as to an action for *crim. con.* by the injured husband.

Then unless we can consider a widow to be an unmarried female, or, in another form of expression, that an unmarried female is synonymous with "a female who has no husband," this action cannot be sustained under the first section of the act. It may be said that to unmarry a person is a phrase signifying to divorce them *matrimonium abrogare*, but it would be impossible to put that interpretation on the word "unmarried" in the first clause, without destroying the evident purpose of the legislature. The term "unmarried female," obviously means, "female unwedded, or in a state of celibacy," "*nondum matrimonio conjuncta* ; and it is inapplicable to a female who has been married and is divorced, or a widow.

The very general language of the second section, that in *any action* for seduction, brought (not saying under this act) by the father or mother, it shall not be necessary to prove service by "the person seduced" (no longer saying, "unmarried female"), but the same, *i.e.*, service shall be *in all, cases* presumed, and no proof shall be received to the contrary, might at first sight lead to the conclusion that even in the present case proof that the plaintiff was the father of the female seduced, and that she had borne a child in consequence, would sustain the action : and the case of *L'Esperance v. Duchene* 7 U. C. Q. B. 146), where the action was held to lie under the statute, although the daughter, who was twenty-two years of age, had not lived in her father's family since she was fifteen months old, would favour such a conclusion. But in *McLeod v. McLeod* (9 U. C. Q. B. 331), where the defendant's plea, that Catharine McLeod, for whose seduction the action was brought by her father, was not the servant

of the plaintiff, was adjudged bad, the learned Chief Justice said: "If the defendant had here stated that Catharine McLeod was a married women, then he would have shewn that he was not traversing an important fact when he alleged want of service." This leads to a contrary result; and the latter words of the first section, "notwithstanding such unmarried female was at the time of her seduction serving or residing with any other person, upon hire or otherwise," seem plainly to indicate that such service or residence—but for the exception—would, even in the case of an unmarried female, have been fatal to the action; and if so, they cannot be less so where the remedy given by this first section does not apply.

I think the rule should be made absolute, without costs.

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### ROSS ET AL. v. BROOKS ET AL.

#### *Arrest—Bail—Insolvent Act.*

The defendant B. having been arrested, gave bail—a verdict was rendered against him in the suit—and a *ca. sa.* issued, which was returned "*non est inventus*," a writ of summons was then issued on the recognizance against Jones, his surety, but prior to the service upon J., the defendant B. applied under the statute 19 Vic., c. 93, as an insolvent debtor (to the judge of the county court of York and Peel), and on the 16th February, obtained the interim order to protect him from arrest; on the 17th February the defendant J. was served. It was contended that the *ca. sa.*, having been received and the return made after the interim order, the bail were not fixed by the return of "*non est inventus*." *Held*, that under the circumstances the bail were liable.

On the 27th August, 1857, *Eccles*, Q. C., obtained a rule drawn up on reading the order of Hagarty, J., made in this cause on the 4th July last; and the affidavits and papers filed, and also the affidavits and papers filed on the application for such order, to shew cause why an exoneretur should not be entered on the bail-piece given upon the arrest of John Brooks, in this cause, or why the proceedings in an action brought by plaintiffs against the said Alexander Jones on the said bail-piece in the court of Queen's Bench should not be perpetually stayed.

From the affidavits it appeared that this action was commenced against defendant, Jones, by non bailable process,



and against defendant Brooks by bailable process. That Brooks was arrested, and Jones and another party became bail for him. That on the trial of the cause a verdict was rendered in Jones's favour, and against Brooks, for upwards of £490. Judgment was thereupon entered against Brooks in December, 1856, and a writ of *ca. sa.* against him was lodged with the sheriff of York and Peel, on the 7th January, 1857, and was returned *non est inventus*.

On the 11th February a writ of summons was issued out of the Queen's Bench by the plaintiffs, against Jones, as one of Brook's bail on the recognizance entered into in this cause, and a copy of that writ was served on Jones on the 17th February last, to which he appeared.

Before this service, Brooks applied to the judge of the county court of York and Peel under the 19 Vic., ch 93, (since repealed,) as an insolvent, and on the 16th of February the judge made his interim order for the protection of Brooks from arrest and imprisonment until the making of the final order, which was made on the 16th March, 1857.

In the action on the recognizance Jones pleaded in abatement the nonjoinder of the other bail, and the issue was tried at the Toronto assizes in May, 1857, and a verdict was rendered for the plaintiffs. Whereupon in Easter Term Jones obtained a rule *nisi* for a new trial, which, after argument, was discharged.

Before pleading in that action, Alexander Jones obtained a summons from the Chief Justice of Upper Canada, to stay all further proceedings, on the ground that the interim order above mentioned was made before the service of process on him, wherefore he could not render Brooks for his own relief, but that summons was afterwards discharged by the Chief Justice.

On the 4th June, 1857, and before the rule for a new trial had been discharged by the Court of Queen's Bench, Brooks rendered himself to the custody of the sheriff of York and Peel, in order to discharge his bail, and was discharged on the 11th of the same month, by virtue of the final order of the 16th March, 1857.

On the 3rd July last an application was made to Hagarty,

J., for a summons to stay proceedings on the judgment, which had been entered, and on the *fi. fa.* issued thereupon, in the action against Jones, and to enter an exoneretur on the bail-piece in this cause, on the return whereof Mr. Justice Hagarty ordered that proceedings should be stayed until the fourth day of the present term.

*Eccles*, made two points, that the bail not being fixed before the interim order, could not be fixed by the return of the *non est inventus*, inasmuch as the writ was received, and the return was made after that order, and when in consequence thereof the bail could not render Brooks, and that the principal, Brooks, having been surrendered before judgment was recovered in the suit in the Queen's Bench on the recognizance, and having been discharged from custody by virtue of the final order, the defendant Jones as his bail was discharged, not having been previously fixed.

*J. R. Jones* contra, insisted that on the facts shewn the bail were fixed, and therefore this application must fail.

DRAPER, C. J.—All turns upon the question when the bail are fixed, and in the present case this turns upon the effect of the interim order.

The Insolvent Debtors' Act, 8 Vic., ch. 48, sec. 1, authorises the judge on the filing of the insolvent's petition, to give a protection to the petitioner from all process whatsoever, either against his person or his property of any description, which protection shall continue in force, and all process be stayed until the appearance of the petitioner. By section 8, this order for protection may be renewed from time to time until the final order. Section 11 provides that a prisoner in execution for debt may be a petitioner for protection from process under this act, and every such petitioner to whom an interim order for protection from process shall have been given, shall not only be protected from process as provided by this act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule, and any such petitioner being a prisoner in execution on any such judgment may, by order of the judge, be discharged out of custody as

to such execution, and such petitioner so discharged shall be protected by his interim order from all process for such time as shall be appointed by the interim order, or any renewal thereof, until the making of the final order. The final order (section 29) shall protect the person of the petitioner from being taken or detained under any process whatever in the case mentioned. First, in respect of debt, &c., due at the time of filing the petition to the creditors named in the schedule, or for which such person had given credit to the petitioner, and which were not then payable, or in respect of other persons not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in the schedule.

It appears to me this interim order, though it frees the defendant from arrest by any creditor, does not affect the rights of his bail, in whose custody he is deemed legally to be, and who might surrender him whenever any necessity arose for them taking this step for their own protection. It is true that if Brooks had been in custody in execution in this suit when he petitioned, he might have been discharged and have obtained the benefit and protection of an interim order, and so I suppose if his bail had rendered him in their own discharge, before the return of the *ca. sa.*, he might have claimed the benefit of the act, coming plainly within the spirit of its provisions, as being when rendered in custody under the *ca. sa.* There is in principle a great resemblance between this case and that of *Payne v. Spencer*, (6 M. & S. 231). And the judgment of *Bayley, J.*, appears to me to be rested upon grounds applicable here. During the continuance of the interim order, I do not see that the bail could, on the ground of its having been issued, have successfully applied for an exoneretur. Our statute certainly differs in a material respect from (5 Geo. II., ch. 30), the English Bankrupt Law, under consideration in the case of *Payne v. Spencer*, for there the act exempted cases where the bankrupt was in custody at the time of his surrender and submission to be examined, whereas our statute, sec. 11, enables a prisoner in execution to become a petitioner, and permits the judge whom he petitions, to give an order for his discharge, and gives him,

after such discharge, the protection of the interim order from all process. Still the common law right of the bail seems untouched, a right which in several respects is more extensive than that of a creditor to arrest, for they may render persons at times, and under circumstances which would protect them from arrest by their creditors.—*Bayley v. Jenners*, (1 Str. 2), *Bryan v. Woodward* (Taunt. 557), *Bond v. Isaac* (1 Burr, 339).

It does not follow that even if a party might obtain his discharge after render, that the bail are either prevented or relieved from rendering him, or are entitled to an exoneretur (see *Jackson v. Cooper*, 4 M. & W. 353), though the courts will generally order an exoneretur in the first instance, if upon a render the debtor would be immediately entitled to his discharge in order to save circuitry or delay, and needless expense.

All must turn upon the state of things during the interim order, and whether the bail could have rendered him during its prevalency, If they could not, then this application, late as it is, must be granted, though only on payment of costs, owing to their delay and unnecessary defence of the action on the recognizance. I attach no importance to the render in June, and the subsequent discharge of Brooks under the final order. For if the bail were fixed then, that cannot help them.

On the best consideration I can give the case, I am of opinion that the bail might have rendered him pending the interim order. At any time before the return of the *ca. sa.* a render would have barred an action. A render in eight days after the service of the process on them would have entitled Jones to relief according to the established practice. A neglect to do this would have fixed them with liability had there been no proceeding under the insolvent act.—(Vide *Southcote v. Braithwaite*, 1 T. R. 624; *Stapleton v. Mc Bar*, 7 Taunt. 591). Such neglect equally fixes them after the petition of insolvency, unless the interim order prevented them taking Brooks, and rendering him in their own discharge; or, which is only a different form of the same question, unless they had made application for an exoneretur pending the



interim order, on the ground that though they might render him, he would thereby become entitled to an immediate discharge, and so the render was an unnecessary step. But they neither rendered Brooks, nor made any application to be relieved during the eight days, and this omission appears to me to have fixed them with liability, and therefore this rule should be discharged.

The Chief Justice referred to *Glendinning v. Robinson*, 1 Taunt. 320; *Coombs v. Dodd*, 2 Dowl. 766; *Shaw v. Cash*, 4 Bing, 80; *Ruston v. Greene*, 2 Dowl. 617; *Jones v. Ellis*, 1 A. & E., 382.

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### LUNDY V. CARR.

#### *Pleading—Consideration—Promissory note.*

In an action on a promissory note, Payee v. Maker, the defendant pleaded that the note was given for plaintiff's title to land, and that plaintiff at the time, and ever since, had no title to the land, and consequently there was no consideration for the note, on demurrer.

*Held*, that the plaintiff having conveyed his "right, title and interest" in the lot for which the note was given, the consideration was sufficient, and the plea bad.

DECLARATION—First count. On a promissory note, payee against the maker.

Second plea to first count.—That note given for the plaintiff's title to land, and that at the time of making the note, and ever since, plaintiff had no right or title, and so there was no consideration for the making of the note.

Demurrer.—That said second plea sets forth a good consideration for the making of said note, viz., the plaintiff's right, title and interest to the lots therein mentioned. 2nd. That it appears by said plea that plaintiff only sold his right, title and interest to the said lots; and even supposing he had no right in law, yet, without fraud, the note given for such right, title and interest would not be avoided.

*S. Richards* for plaintiff, supported the demurrer.

*Blevins*, contra.

DRAPER, C. J., delivered the judgment of the court.

According to the plea, the plaintiff at a given time sold all his right, title and interest in certain lots of land to defen-

dant, who gave him the note in question as part of the purchase money. The sale, as stated, would there for appear to have been complete. Then it is averred that *at the time of the making the promissory note sued on, and the delivery thereof to the plaintiff*, the plaintiff had not, nor has he since had any right or title in law or in equity to the lands mentioned.

I think the plea is bad. It does not appear but that the defendant has got all that he expected. And we must assume that whatever interest the plaintiff may have had, or supposed he had, has been conveyed, and that such conveyance has been of value to the defendant, though in fact the plaintiff's legal or equitable right, title or interest to convey is not set forth. It is not set up that there was any fraud practised upon the defendant, and the very terms of the sale as set forth imply that the plaintiff did not assume to convey any absolute estate in the lots, but only such right, title and interest, whatever it might be, which he was entitled to. We may, I think, fairly assume that this sale of the plaintiff's "right, title and interest, both at law and in equity" was made by deed, and that such a deed would either contain covenants, or that the defendant was willing to accept it without. In that case I do not see there has been an entire failure of consideration, for the defendant has the deed and his remedy on its covenants express or implied, or at least he has the plaintiff bound by an estoppel, even as to any future interest he may acquire. It is further objected that the plaintiff may consistently with the terms of the plea have had some right, &c., when he sold to the defendant, though at the time of the making the note, he may have had none. This objection seems however to savour of the days of special demurrer, and we can have no wish to turn backwards to them.

Judgment for plaintiff on demurrer.

The Chief Justice referred to Southall v. Rigg, and Forman v. Wright. 11 C. B. 481; Jones v. Jones, 6 M. & W. 84; Wells v. Hopkins, 5 M. & W. 7; Thompson v. Farr, 6 U. C. Q. B. 387; Blanchfield v. Birdsall, 7 U. C. Q. B. 141; Thomas v. Crooks, 11 U. C. Q. B. 579.

WHITMARSH V. THE GRAND TRUNK RAILWAY COMPANY OF  
CANADA.*Railway Crossing—Road Company.*

Where a railway company made alterations in the grade of a road at the railway crossing, which road was owned by a legally incorporated road company, and the alterations were subsequently ratified and adopted by the road company by collecting and receiving tolls.

*Held*, that the road company, by such adoption and acceptance, were to be treated as responsible for any injury resulting from the omission to fulfil a duty arising out of such altered state of the highway.

The declaration contains four counts;

1st—That defendant's railway is constructed across a certain highway, known as the "Brockville and North Augusta Plank Road," higher than one inch above the level thereof, whereby the highway was obstructed, and it became defendants' duty to restore it to its former state or to such state as not to impair its usefulness; that though a reasonable time hath elapsed, defendants have neglected so to do, whereby the horse, harness and carriage of plaintiff lawfully proceeding along the highway, were precipitated from the highway and were broken, &c., and plaintiff and his wife, who were driving in the carriage, were thrown down and hurt.

2nd—That defendant's railway is constructed across the highway at a level, whereby the rail rises more than one inch above the highway, by reason whereof it became the duty of the defendants to carry the railway over the highway by a bridge, or under the same by a tunnel, yet defendants neglected, whereby, &c., as in the first count.

3rd—That the railway of defendants intersects the said highway in the township of Elizabethtown, and has been constructed by the defendants across the said highway at a level more than one inch higher than the level of the highway at the place of intersection, whereby the highway was obstructed, and in order to remove the obstruction, the defendants raised the highway to the level of the railway at such intersection by an embankment, with sides so steep and unprotected as to render the passage along the same dangerous, by reason whereof plaintiff's horse, &c., as before.

4th—That defendants' railway in Elizabethtown had been

constructed across a highway at a level more than one inch higher than the level of the highway at the place of intersection by an embankment so steep and precipitous on the side, and dangerous to travellers, that it became the duty of defendants to protect the sides of the embankment by a fence. That though a reasonable time has elapsed, the defendants have neglected to protect, &c., by any fence, by means whereof, and from the absence of such protection, plaintiff and his wife then lawfully driving along the embankment with a horse and buggy, were thrown over the sides of the embankment, &c.

2nd plea to the first count—That the rails of the railway do not cross the highway at the point of intersection at a greater height than one inch above the present surface of said highway.

4th plea to the second count, to the same effect.

5th plea to the third count, to the same effect.

7th plea to the fourth count, to the same effect.

9th plea to the first, second and third counts—That the highway was at the said times when &c., the property of an incorporated company, known as the Brockville and North Augusta Plank Road Company, incorporated according to the statutes of the province, which highway is more than ten miles in length, and the said company collect tolls thereon; that such company has the right to make, raise or lower the surface of the highway, provided it shall not have a higher grade at the part so raised or lowered than one foot in twenty along such highway. That the defendants, by the authority, and with the sanction and with the subsequent sanction and approbation of the said road company carried their railway across the said highway and raised the surface of the highway to the level of railway, so that the grade of the highway was not increased thereby more than one foot in elevation to every twenty feet along said highway, and also making the rails of the railway not to rise above the surface of the highway so raised more than one inch, and that after the railway was so carried over the highway, the said road company acquiesced in, sanctioned and adopted the said crossing, from the defendants.



The tenth plea was pleaded to the fourth count, and was exactly similar to the ninth plea.

The plaintiff demurred to all the foregoing pleas, and assigned as the ground of demurrer to the second plea, that it goes only to the present state of the railway and highway, and not to their condition at the time of the alleged grievance.

The plaintiff also assigned similar grounds of demurrer to the fourth, fifth and seventh pleas.

The ninth plea was demurred to because it admitted the wrong complained of, but attempted to shift the responsibility for it. That the authority and approbation and ultimate adoption by the road company of the acts done in altering the highway, formed no answer to the plaintiff's cause of action.

The tenth plea was objected to on similar grounds to the ninth.

The defendants excepted to the sufficiency of the declaration, but the judgment of the court renders it unnecessary to notice their objections.

The demurrer was argued by *Sherwood*, Q. C., for the plaintiff, referring to 14 & 15 Vic., ch. 54.

And by *Bell* (of Belleville) for defendants, citing 16 Vic., ch. 190; *Day v. Grand Trunk Railroad Co.*, 5 U. C. C. P. 420; *Abraham v. The Great Northern Railway Co.*, 16 Q. B., 586; *Reg. v. Betts*, 16 Q. B. 1036; *Reg. v. The Grand Trunk Railway Co.*, 15 Q. B. U. C., 121.

DRAPER, C. J., delivered the judgment of the court.

The second, fourth, fifth and seventh pleas were all given up. We have therefore only to consider the sufficiency of the ninth and tenth.

The statute 14 & 15 Vic., ch. 51, sec. 9, subs. 5, authorises railway companies to construct, &c., the railway across, along or upon any highway, which it shall intersect or touch; but the highway so intersected shall be restored to its former state, or to such state as not to have impaired its usefulness.

Section twelve, sub-secs. one and two, declare "that the rail itself, provided it does not rise above or sink below the

surface of the road more than one inch, shall not be deemed an obstruction, and it expressly provides that within the prescribed limit of rise or descent of one inch, the railway may be carried across or above any highway. The third and fourth sub-sections, which provide for the carrying the railway over a highway, and for carrying the highway over the railway, respectively declare, as to the first, that the descent under any such bridge shall not exceed one foot in twenty feet, and as to the second, that the ascent of the bridge shall not exceed one foot in twenty feet increase over the natural ascent of the highway.

The twelfth section, therefore, clearly contemplates a change in the natural level of the highway for the purposes mentioned in the third and fourth sub sections.

In the present case, however, the raising the natural level of the highway was not for either of the purposes mentioned in those subsections, and the ninth and tenth pleas do not rest the justification on any authority derived from them.

The material facts stated and admitted by the demurrer are, 1st—That the highway in question has been constructed by, and is, the property of the Brockville and North Augusta Plank Road Company, which is a company incorporated under the provincial statutes (vide, 12 Vic., ch. 84; 13 & 14 Vic., ch. 14 & 72; 14 Vic., ch. 122; 16 Vic., ch. 190.) 2nd—That the defendants had the sanction and authority of this road company to alter the original grade of this highway, so as to meet the grade or level of the railway at the point of intersection. 3rd—That in the alteration of the grade of the highway the defendants have conformed to the provisions of the statute 16 Vic., ch. 190, in not making it of a "higher grade than one foot elevation to twenty feet along the road," as well as to the similar limitation contained in the third and fourth sub-secs. above quoted. 4th—That the road company have adopted the alteration, and have treated the road so altered as their own, by collecting and receiving tolls from persons using it. 5th—That the rail of the railway where it crosses the altered highway, does not rise more than one inch above the surface thereof.

The plea therefore shews that the highway is restored to

such a state as is consistent with the provisions of the 16 Vic. ch. 190, and if so, the defendants cannot be treated as having impaired its usefulness. It contains therefore an answer to the first count.

It may be questioned whether the second count means to charge that the rail rises more than one inch above the surface of the highway in its altered state, or, that the rail rises more than one inch above the original surface of the highway. But taken in either sense the plea contains an answer. As to the first by an express denial that the rail does rise more than one inch above the altered surface, and as to the second by a justification of the act of raising the surface, the sufficiency of which will be best disposed of in considering how far the ninth plea answers the third count.

As to which, I think the fifth sub-section of the ninth section of the 14 & 15 Vic., ch. 51, intended to leave it in the discretion of those by whom any railway is constructed, to cross *any* highway, with the railway, either in a manner which would enable them to restore the highway to its former state, or in a manner which would enable them to restore the highway, not precisely as it was before, but so as not to impair its usefulness. Where the level of the highway and that of the railway were similar, there would be only a temporary obstruction during the progress of the work, and except the carrying over of the rails, not rising or sinking more than one inch, the highway would be completely restored. But many cases must arise in which the level of the railway would be a few feet above or below the level of the highway, and the language used, that the highway shall be restored "to such state as not to have impaired its usefulness," obviously points to such a contingency. The lowering or raising the surface of the highway, might enable the defendants to cross the highway with their railway without building a bridge or a tunnel, and yet the usefulness of the highway would no more be *impaired* by a rise or a descent so created than if it had arisen from the natural formation of the ground. And in my opinion the defendants have that power under the words of section ninth, above quoted (See Reg. v. Eastern Counties Railway, 2 Q. B. 569).

So far therefore as making a necessary embankment, to raise the highway to the level of the railway, the plea discloses a sufficient justification. And it also avers that this act was done by and with the consent and authority of the plank road company, whose property, as a road on which tolls could be collected, this highway is stated to be, and who are bound by the statute 16 Vic. to keep the road in good and efficient repair. The alteration was (the plea states) adopted by them, and that adoption, as appears to me, makes the act of alteration theirs, and that as regards the public, the road must be treated as having been placed in its present state by them. In that state they claim to receive and do receive tolls upon it, and for its continuance in that state, if a nuisance to the public, or a cause of injury to an individual, they are, I apprehend, in law responsible. It appears to me therefore, that the ninth plea furnishes an answer to the third count.

For the reason already given, namely, that from the adoption and acceptance of the road as altered the road company are to be treated as responsible if there be any injury resulting from the omission to fulfil a duty arising out of such altered state of the highway. I think the tenth plea contains a sufficient answer to the fourth count.

This opinion renders it unnecessary to consider the objections to the declaration.

I think there should be judgment for the defendants on the ninth and tenth pleas, for plaintiff on the others.

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\*DARK V. THE MUNICIPAL COUNCIL OF HURON AND BRUCE.

*Court house—Municipal Council.*

The plaintiff brought an action for the use and occupation of a room in his hotel as a court room, and proved that the sheriff of the county had engaged the room, and that the chairman of the municipal council had signed an order for the payment of his charges. *Held*, not recoverable.

DEBT—for use and occupation of certain rooms to hold the courts of assize and quarter sessions.

*Pleas*, never indebted.

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\* This judgment was delivered in the time of Chief Justice Macaulay, but was not reported; being since cited on various occasions, it is thought advisable to publish it.



The plaintiff proved that the rooms were engaged by the sheriff, and used as alleged, and that an order had been issued, signed by the chairman of the quarter sessions, dated 14th of January, 1854, upon the treasurer of the Huron District, to pay plaintiff £34, for accomodation for holding the courts of assize and quarter sessions in the British Exchange Hotel, from January to November, 1853.

At the trial before *Draper, J.*, at the Goderich assizes, the facts as stated in the declaration—except that no request was made by defendants—were proved, but the sheriff proved that he had hired the rooms. No evidence was given of the want of a court house, or of any necessity or of any authority to him to hire them by order of the quarter sessions, or of the defendants.

MACAULAY, C. J., delivered the judgment of the court.

Under the foregoing state of facts we do not think the action maintainable; but that they fail to establish a legal liability against the defendants, who do not seem to have authorised or approved of the hiring of the rooms directly or indirectly, under seal or otherwise; nor is any other authority shewn beyond the sheriff's spontaneous act, which is not sufficient, in our opinion, to create a debt recoverable against the defendants in an action of this kind. The utmost the facts amount to is, that the sheriff having engaged the apartments, for reasons not explained, the court of quarter sessions, through the chairman, ordered the treasurer to pay the plaintiff the amount, which he refused to do.

This does not establish a debt against the defendants, who do not appear to have been requested to pay, and who, for all that is shewn, may have been entirely ignorant of the whole proceedings.

At all events, no authority is cited that seems sufficient to maintain this action.

The verdict must therefore be for the defendants.

See 12 Vic., ch. 81, secs. 36, 40, and 41. No. 2 and 92, *Hinkley v. Mayor of Stafford*, 6 Ex. 279.

## THE QUEEN V. JAMES HAGAR.

*Indian lands—Statute 13 & 14 Vic., ch. 74.*

The defendant entered into a verbal agreement to farm the land of an Indian woman on shares for five years, and took possession.

He was held guilty of a misdemeanor under 13 & 14 Vic., ch. 74.

The indictment contained two counts, framed under the 2nd section of 13 & 14 Vic., ch. 74, which enacts that if any person without the authority and consent of her Majesty, attested by an instrument under the great seal of the province, or under the privy seal of the Governor General, for the time being, shall "*in any manner or form, or upon any terms whatsoever, purchase or lease any lands in Upper Canada of or from the said Indians, or any of them, or make any contract with such Indians, or any of them, for or concerning the sale of any lands therein, or shall in any manner give, sell, demise, convey, or otherwise dispose of any such lands, or any interest therein, or offer so to do; or shall enter on, or take possession of, or settle on any such lands by pretext, or colour of any such right or interest in the same in consequence of any such purchase or contract made or to be made with such Indians, or any of them, every such person shall in every such case be deemed guilty of a misdemeanour,*" &c.

At the trial before *Burns, J.*, at the last assizes for the county of Brant, the facts appeared to be as follows:—an Indian woman of the name of Mary Martin lived upon and had cultivated lot No. 46, in the 6th range of the township of Tuscarora, which was Indian lands. Her husband, Joseph Martin, has not lived with her upon this lot for some time. The woman was poor, and raised a few vegetables and other things upon the lot, and received an allowance of £6 a-year from the Indian funds. She desired to make the lot profitable to her, and thought it would be better to have it worked by a white man than by Indians, and therefore applied to the defendant, who is not an Indian, to take the farm from her on shares. This was done in spring of 1857, and the arrangement was that the defendant should take the farm and work it upon shares for five years, and give Mary Martin one-third of the crops raised from it. Nothing in writing was signed, it being merely a verbal arrangement.

After the agreement the Indian chiefs persuaded the woman to break it off, and she went to the defendant and told him not to enter into possession, but he said he would have the place for the five years as agreed upon, and accordingly afterwards did take possession, and still had it, and has sown several acres with fall wheat shortly before the trial. A witness (an Indian) proved that she could get along without letting the place in the manner she had, but still that he thought the arrangement was advantageous to her.

The defendant's counsel raised the objection that the defendant could not legally be convicted, because under the second section of the act, a lease meant a legal lease, whereas, in the present case, the verbal lease was void. That the kind of arrangement proved in this case being a beneficial one for the woman, was not within the meaning of the second section of the act. The defendant, it was proved, had no permission or consent of the commissioner for Indian affairs on the Grand River, to make any arrangement with the woman.

The jury at the recommendation of the learned judge, found the defendant guilty, with the understanding that the case should be reserved for the consideration of the court of Common Pleas to say whether the defendant could be properly convicted upon these facts.

In Michaelmas Term, *Harrison, R.* was heard in support of the conviction; and *Cameron M. C.*, against it.

DRAPER, C. J., delivered the judgment of the court.

It seems to me quite clear, that on the second count, at all events, the defendant was properly convicted. The evidence shews that although after the bargain made, he was in consequence of the interference of some of the Indian chiefs, told not to go into possession, that he insisted that he would have the place for the five years mentioned; and that he has taken, and still retains possession.

I think also, that the evidence sustains the first count, for it brings the defendant within the letter of the statute, if any person shall "*in any manner or form, or upon any terms whatsoever*" lease. Now leasing upon shares is certainly within both the letter and spirit of these words, and it is as

well an understood mode of leasing as any in the country; and the defendant, by insisting on a right to have the possession according to the agreement made, and entering in affirmance of that right, has claimed the benefit of such a lease, though void as to *five* years under the Statute of Frauds, and void under the act for want of the consent of her Majesty.

As to the argument that the arrangement was really and substantially for the benefit of the particular Indian, to give effect to it, would be to legislate, instead of to administer the law.

The statute is designed to protect the Indians from all contracts made by them in respect to the lands set apart for their use, in consequence of their own improvidence and liability to imposition. The condition precedent to make any such contract valid, is the consent of the crown, and it is not left to the court or jury to consider, whether in their opinion the bargain was such that the crown ought to consent to, but whether in fact the consent was given.

Conviction affirmed.

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#### WADDELL V. MACBRIDE ET AL.

##### *Shipping agents—Carriers.*

The plaintiff employed S. & H., who owned a warehouse, to purchase and store wheat for him. One G. stored wheat in the same warehouse, and having a quantity to ship, wrote to defendants, offering to load their vessel at certain rates, which offer was accepted, and in the meantime he saw the plaintiff, who agreed to ship 2000 bushels of his wheat in the same vessel in which G. was about to ship, and gave directions to S. & H. accordingly. 5,653 bushels of wheat in all were shipped *en masse*, as it had been stored. H., one of the firm of S. & H., superintending the shipping, and stating to the captain at the time (according to his own evidence) that he was shipping plaintiff's wheat first. The plaintiff's wheat turned out short some 400 bushels.

*Held*, first, that the plaintiff was entitled to recover, and secondly, that the owners of the vessel were liable.

DECLARATION stated that the plaintiff had, at the request of the defendant, delivered to them as owners of a general vessel called the "Buttles," 2,000 bushels of wheat to be carried in such vessel from the port of Bayfield on lake Huron to Oswego on lake Ontario, and there to be delivered for plaintiff in good order (the danger of the navigation



excepted); that the defendants received the wheat for the purposes aforesaid, and though the vessel arrived safely at Oswego, yet defendants did not deliver, &c., but on the contrary, &c. Second count.—That defendants wrongfully defrauded the plaintiff of the use and possession of the plaintiff's goods, viz., 2,000 bushels of wheat.

Pleas—1st, to first count.—Denial of the delivery of the wheat by plaintiff to defendants. 2nd to the first count.—That defendants did not take and receive the wheat for the purposes alleged. 3rd.—That defendants did deliver the wheat at Oswego. 4th to the second count.—That defendants did not deprive &c. Issues.

The trial took place in November last, at Hamilton, before *Hagarty, J.* It appeared that the defendants were owners of the schooner "Buttles." The plaintiff had employed Messrs Stark & Hamilton to buy wheat for him, receivable into their storehouse at Bayfield. One Gerrie had purchased wheat from several parties, who had also delivered it into Stark & Hamilton's storehouse at Bayfield, Gerrie taking from the vendors the accountable receipts which each vendor held from Stark & Hamilton. He had arranged with Stark & Hamilton as to the ownership of 1016 bushels, by taking their receipt for so much, and besides this receipt he had held others, (from vendors to him,) amounting in the whole to 1314 bushels of fall wheat, and, as he insisted, to much more, though Stark & Hamilton asserted that some of the smaller receipts held by him were included in their receipt given for 1016 bushels. Hamilton, one of the firm of Stark & Hamilton, swore he shipped 1781 bushels of plaintiff's wheat, in that way distinctly affirming that the plaintiff had that quantity in their storehouse. All the fall wheat in the storehouse was mixed together as fast as it was received from the different farmers, so that it was impossible to distinguish between what had been purchased by Stark & Hamilton for the plaintiff, and what had been deposited by various other parties, who had transferred to Gerrie their receipts, and the right to claim from Stark & Hamilton the quantity of wheat severally stated therein.

On the 7th of April, 1857, Gerrie wrote to Macbride, one of the defendants, the following letter :

"I have been sick for over one month, and have neglected all business. I will be in London to-morrow, and stay there until I leave for Bayfield to ship. I can load your schooner that is laying in Cleveland at eight cents for Buffalo, or twelve for Oswego, and you can send her off at once for that port. You will see by the decline in wheat that high freight will not be paid this spring. Please answer this as soon as possible, and oblige, &c."

This offer the defendants appear to have accepted, and the schooner "Buttles" went to Bayfield. In the mean time Gerrie saw the plaintiff and informed him he could take 2,000 bushels of wheat for him from Bayfield to Oswego, and the plaintiff agreed to give him that quantity, and it appeared that plaintiff gave directions to Stark & Hamilton to ship his wheat on board the "Buttles." They shipped on board this vessel 2,681 bushels of wheat, Hamilton superintending. According to his evidence, he told the captain of the schooner that he was shipping all plaintiff's wheat first. That after they had shipped all there was to be shipped, there would be nine hundred bushels of Gerrie's, and the residue would be plaintiff's. That Gerrie owed them for storage, and that they meant to detain 116 bushels of his wheat to secure their claim. Hamilton did not at that moment seem aware that Gerrie claimed more than the 1016 bushels mentioned in the large receipt. The captain of the schooner differed in his statement, representing that Hamilton only said that part of the wheat being shipped was plaintiff's and that he replied, he did not care whose it was as he looked to Gerrie. But when it was all loaded, the captain refused to sign a bill of lading as prepared by Hamilton, representing the 1781 bushels to have been shipped for plaintiff, and he further said that from the receipts produced by Gerrie to Hamilton after the wheat was shipped, it appeared Gerrie was entitled to 1314 bushels, The vessel would carry 8000, but that quantity could not be obtained for shipment, and Gerrie, who seems to have procured all the freight, agreed that sixteen cents per bushel should be paid as the freight on what was shipped, and the consignees of the wheat had to pay that freight. Gerrie made this arrangement with the captain after the vessel had

received the wheat on board at Bayfield. There were 5,653 bushels actually shipped in all, and Gerrie made out the bills of lading, which the captain signed. One was as follows :

“ Goderich, 185 . Shipped by R. Gerrie on board the schooner ‘ Buttless,’ Duncan McPherson, master, the undermentioned articles in good order and condition, marked and numbered as per margin, which are to be delivered in like good order and condition (the dangers of the navigation only accepted) at the port of Oswego, unto Mr. Carriington or his assigns, paying freight hence at the rate of sixteen cents per bushel. In witness whereof the master or purser of the said schooner, hath signed two bills of lading of this tenor and date, one of which being accomplished, the other to stand void.

4286<sup>23</sup> bushels winter wheat, 16 cents. And on same B. L. 1366<sup>57</sup> bushels to Ames & Sloan’s account.

R. R. WADDELL.”

Ames & Sloan were the plaintiff’s consignees, to whom that quantity was delivered at Oswego. The captain did not go further with the vessel than Port Burwell ; there one of the defendants took his place, and as the freight was to be paid by the consignees it is to be presumed he received it. Gerrie gave no directions about it, and made no claim to it. The learned judge left it to the jury to say what quantity of wheat of plaintiff’s was shipped on board the vessel : and was the wheat shipped by Stark & Hamilton on the contract, that it was to be subject to Gerrie’s order, and his right to apportion it, or in the ordinary way as in a vessel owned by defendants. The jury found for defendants.

In Michaelmas Term, *Start* obtained a rule *nisi* to set aside this verdict, and for a new trial, on the ground that the verdict was contrary to evidence, as it appeared there was no charter party between the defendants and Gerrie, and nothing to discharge the defendants from their liability as general owners, and that the verdict is contrary to the law and the weight of evidence, and also for misdirection in leaving to the jury to find whether Gerrie had any control over the vessel and its cargo, there being no evidence sustaining that position.

*Freeman*, Q. C., shewed cause.

*Start* cited Abbott on Shipping, 8th Eng. Ed., ch. 1, p. 59.



DRAPER, C. J., delivered the judgment of the court.

Two questions arise. The first as to plaintiff's right to claim more than 1367 bushels of wheat delivered to his agents at Oswego. The second—whether, under the facts, he can claim compensation (if otherwise entitled to it) against the defendants.

1st—The wheat received by Stark & Hamilton into their storehouse, coming in from various parties was indiscriminately mixed. By their receipts they acknowledged the right of the holder thereof to get from them a given quantity of wheat, but not the identical wheat delivered. Such appears to be the established and well-understood course of dealing in all similar transactions. Whoever presented any of these receipts was entitled, on demand, to receive the quantity therein specified, and each quantity, as it was severed from the general mass in compliance with such demand, became the property of the individual rightfully demanding it. Until severance, no particular part could be claimed by the holder of a receipt as his own, and the duty and authority to sever, was, as I conceive, exclusively vested in the storehouse keepers. It follows, in my opinion, that Gerrie could have no right to control or direct the appropriation of any part of the wheat while it was in the possession of Stark & Hamilton, and if they delivered any ascertained quantity, as and for wheat belonging to the plaintiff, which had been deposited with them, such delivery (in the absence of fraud) would vest the exclusive right of property in the plaintiff, and no act of Gerrie's, even assuming him to be the charterer of the schooner, and to have wheat also in Stark & Hamilton's possession, which he was demanding to be shipped on board the same vessel, would affect an appropriation actually made by the storehouse keepers; in other words, Gerrie could not take as his own, wheat which Hamilton and Stark had severed, and appropriated for the plaintiff (the plaintiff being entitled to such quantity), and take it in satisfaction of a corresponding quantity of wheat which he had a right to demand from them. The fact of appropriation is of course for the jury, but the power and duty of appropriation, and its consequence, appears to me a matter of law to be given to



them. The subsequent mixture of the wheat in the schooner could not alter the plaintiff's right.

2nd—Assuming, for the sake of argument, that the 414 bushels of wheat claimed by the plaintiff in this suit were in fact appropriated by Stark & Hamilton so as to be his absolute property, shipped on a contract to be carried to Oswego, with whom was that contract made? Who is to be treated as owner, for the time being, of the schooner? The general ownership of the defendants is admitted, and that admission is sufficient to involve liability to the plaintiff (see *Colvin et al. v. Newberry et al.*, 8 B. & C. 166, and in *Error*, 7 Bing 190, and 1 Cl. & F. 233) unless they had, for that voyage, so transferred their right as to make some one else owner. The liability rests between them and Gerrie, though the latter might, by the appropriation of the wheat to his own use, be liable, irrespective of the question of liability as shipowner.

There was no charter party regularly drawn up, nor any thing in writing beyond Gerrie's letter, and the acceptance of his proposal. Now, looking at the language of Gerrie's letter, it seems to me to import nothing more than an offer to contract with the defendants for the use of the schooner, with the services of the captain and his crew, to carry Gerrie's wheat from Bayfield to Oswego, undertaking to find her a full cargo, at twelve cents per bushel. It does not seem to have been contemplated that Gerrie should receive the freight, or make as a profit whatever he could get over twelve cents per bushel. On the contrary, when he could not get a full freight, he made a new contract with the master, treating him as agent for the owners, which, if Gerrie had then been the charterer of the vessel, the master for that purpose would not have been. And we find further that the freight was to be collected from the consignees at Oswego, not for Gerrie, for he swore he had nothing to do with the vessel, and did not give any instructions with regard to her after she left Bayfield. One of the owners apparently received the freight; and it is not pretended that he received it as agent, or for the benefit of Gerrie but he took the substituted contract at sixteen cents, instead of twelve cents per bushel, and received it for his own use. I think it quite

clear that he would have had a lien on the wheat shipped by Gerrie for the freight, according to the bill of lading produced, which is inconsistent with the idea that Gerrie had chartered the vessel for that voyage, for in that case, he, and not the owner, would have had a right to the freight and the owner acting as captain of the schooner, must have received and collected it for Gerrie's use. And I think, therefore, that if the wheat claimed was the plaintiff's wheat the defendants, as owners of the schooner, are the parties answerable for it. The authorities are all collected in *Marquand v. Banner*, 6 E. & B. 232.

On the whole, I think there should be a new trial.

If the plaintiff cannot convince the jury that the whole quantity of 1781 bushels, or some quantity exceeding 1367 bushels was set apart by Hamilton from the general mass in their storehouse, and delivered specially as his, he will fail. If he succeeds in this, I think he ought to recover against the present defendant.

New trial on payment of cost.

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### LOUCKS V. THE MUNICIPALITY OF RUSSELL.

#### *Municipal townships—Division of into wards.*

Upon an application to quash a by-law dividing a township into rural wards where neither the townships sought to be divided, nor the union of townships of which it formed one, were prior to the passing of the by-law divided into wards; and the by-law dividing the same was not passed within the first nine months of the year in which the junior townships had 100 resident freeholders and householders on its collector's roll. *Held*, that the by-law was invalid.

In Easter Term, 20 Vic; *S. Richards* obtained a rule *nisi*, calling upon the municipality of the township of Russell to show cause why the by-law passed by the municipality of the united townships of Russell and Cambridge, on the 4th of December, 1856, entitled a by-law to divide the township of Russell into wards, should not be quashed with costs; because, 1st, neither the township of Russell nor the united townships of Russell and Cambridge were previously to the passing of such by-law divided into wards. 2nd. That the by-law was not passed within the first nine calendar months of the year in which the junior township, Cambridge, had a

hundred resident freeholders and householders on its collector's roll. 3rd. That while the union continued, the municipality of the united townships could not legally divide the township of Russell alone into wards. He put in the by-law duly verified, and certified by the clerk of the municipality of the late united townships, and town clerk of Russell, under the seal of both municipalities, passed on the 4th of December, 1856, reciting that the separation of Russell and Cambridge was to take effect on the 1st day of January, 1857, and that it was necessary to divide Russell into wards; such division to take effect on the 1st of January, 1857, and dividing that township into five wards, describing them, and appointing a place of election for each ward. He also filed the affidavit of Elisha Fox Loucks, stating that he was, during all the year 1856, a resident inhabitant householder, and a municipal elector of the township of Russell. That until 1st January, 1857, Russell and Cambridge were united for municipal purposes, Russell being the senior township. That the municipal council of Prescott and Russell, under the 11th section of 16 Vic., ch. 181, did, on 30th September, 1856, pass a by-law whereby, upon, from, and after the 1st January, 1857, the townships of Russell and Cambridge were separated. That on the 4th December, 1856, the municipality of the united townships of Russell and Cambridge passed the by-law complained against. That neither Russell nor Cambridge were divided into wards at any time during their union.

On Friday, August 28th, in the following term, *Richards* moved his rule absolute, on an affidavit setting forth that in January last, two sets of municipal councillors for the township of Russell were elected, one by ward elections, the other by general election of the whole township: that William Hamilton is the reeve of the council elected by wards, and William Eadie the reeve of the council elected at general election: that William Hamilton was the reeve of the council of the united townships in 1856: that James Keays was town clerk of the united townships for 1856, and claims to be town clerk of Russell for the current year; and then service of the rule on Hamilton, Eadie, and Keays is proved, the last service being on the 23rd July, 1857.

*Eccles*, Q. C., asked, on the last day of term, to enlarge the rule until the 1st day of next term.

DRAPER, C. J., delivered the judgment of the court.

The following sections of the statute seems to contain all that may be referred to :

12 Vic., ch. 81, sec. 4, and sec. 8, as amended by 13 & 14 Vic., ch. 64, schedule A., No. 1, sections 11, 12, 13, 14, and 16; and 16 Vic., ch. 181, sec. 11.

Every union of townships may be divided into *five* rural wards, and such division may be altered and a new one made. In the first instance the power of dividing into wards is to be exercised by the municipal council of the county, (sec. 4) but subsequently the municipality of the township may divide or re-arrange a previous division (secs. 8 and 15.)

Whenever a junior township has on its collector's roll 100 resident freeholders and householders, it shall be a separate corporation, upon, from, and after the first January next but one after the roll shall so contain 100 names; and the township or townships to which it had been united shall be, and be considered separate townships (secs. 12 and 16, the latter is amended by 13 & 14 Vic., ch. 64, schedule A., Nos. 2 & 3).

The municipal council of the county, may (by by-law to be passed during the first nine months of the year next following that in which the collector's roll of any junior township has 100 resident freeholders and householders named on it,) *divide such junior township into wards* according to the 4, 5, 6, and 7 sections of the act, 11th section.

The municipality of the union of townships may, (by by-law to be passed during the first nine months of the year next following that in which the collector's roll of the junior township has 100 resident freeholders and householders named on it), divide the remaining, *i. e.*, the senior township or townships *anew* into rural wards, in conformity with the provisions in the 8, 9, & 10th sections of the act, (sec. 13.)

If the municipality of the union of townships omit to make a new division under sec. 13, and in consequence of the whole of any rural ward of the union lying altogether within the



limits of the junior township, so that in fact the senior township, or the remaining townships, are left with less than five wards, then the elections of councillors for the senior township, or remaining townships, shall, after the dissolution of the union, be made at a general township meeting, and not by rural wards, until the municipality of the senior township, or remaining townships, shall have made a new division into wards. But if, after the dissolution of any union, *parts* of rural wards remain within the senior township or remaining townships, parts only of such wards being within the junior townships separated from the union, then the election of township councillors shall continue to be by wards. In other words, the parts of rural wards which remain within the senior township or remaining townships, shall be deemed to be complete wards in such senior or remaining township or townships (sec. 14.)

Whenever a majority of at least two-thirds of the freeholders and householders rated on the assessment roll resident in any junior township, having within it at least 50 resident freeholders and householders on such roll, petition the municipal council of the then county, stating their desire to be formed into a separate municipality, the county municipality may by law separate such junior township from any other township to which it is united, and declare that such separation shall take effect from the 1st January next, after three calendar months from the passing of the by-law, and from such 1st day of January such junior township, and that to which it shall have been united, shall be separate townships.

In Michaelmas Term, Mr. *Richards* has again asked us for judgment, and the opposite party have expressed no desire for further delay, and have shewn no cause in fact or in law against the rule being made absolute.

I think it was *extra vires* for the municipal council of the united townships to pass this by-law on the facts set forth at the time at which, on the face of it, it appears to have been past. The objection as to the date is apparent on its face, and connected with the recital it contains, and the matters stated on affidavit satisfy me we ought not to allow it to stand.

## CORBY ET AL. V. COTTON ET AL.

*Mortgage—Waiver—Damages.*

This action was brought on a bond, conditioned to convey within three months a certain steamboat, and for quiet possession of the same. The breaches assigned being for not conveying within three months, and for an eviction by a third party. The defendants pleaded that the steamboat was mortgaged to one J. H. C., at the time of the entering into the bond (of which plaintiffs were well aware) for the same amount as plaintiffs had agreed to pay defendants, and the notes given by plaintiffs were handed to J. H. C., who then held the mortgage as collateral security for the due payment of the notes; and that plaintiffs thereupon discharged defendants from procuring such conveyance. Secondly—That J. H. C. afterwards transferred the mortgage to O. S. G., and that plaintiffs made default in the payment of one of the notes, whereupon O. S. G. took possession of the property. The substantiality of the pleas came before the court on demurrer, see page 209.

The question on this motion was, whether the plaintiffs were entitled to the damages as assessed by the jury (£6675), the defendants contending that the measure of damages should have been the amount necessary to redeem the steamboat, the court *held* that the damages were properly assessed.

DEBT on bond dated 23rd of May, 1854, in a penal sum of £10,000, whereby, after reciting that the plaintiffs, being desirous of purchasing the steamer City of Hamilton, which was supposed to be owned by the firm of Donald Bethune & Co., had been in treaty with one of the defendants (Holland), the managing agent of that firm in the absence of Donald Bethune, the general and managing partner thereof, for the purchase of said steamer; and that Holland by and with the advice and consent of the other defendants, had agreed with plaintiffs for the sale to them of the said vessel at the price of £6,000, payable, £2,000 down £1,000 on the 1st of December, 1854, £1,500 on the 1st of December, 1855, and £1,500 on the 1st of December, 1856. The last three payments to be secured by promissory notes, bearing interest. That, owing to Donald Bethune's absence, the title to the boat could not be conveyed to plaintiffs, but that in order to close the sale at once, it had been agreed by all the parties that the sale should be at once completed, and the vessel be delivered into the hands of the plaintiffs, and that the obligors should become bound to plaintiffs, that a good and valid conveyance should be made, and a good and valid title given to plaintiffs by the parties legally entitled to convey the same, free from all claims and incumbrances, within three

calendar months from the date of the bond, and to warrant and defend the plaintiffs in possession of the said steamboat against all legal and equitable claims and demands by or from any persons not claiming under the plaintiffs, and after reciting that in pursuance of said agreement, the plaintiffs had at or before the sealing of the said bond, paid the sum of £2,000 to Holland for the said firm, and had made their three promissory notes, payable, &c.; and that in further pursuance of the said agreement, possession had been or would be given to the plaintiffs, of the said steamboat. The condition was declared to be, that if the defendants did and should, within three calendar months from the date of the said bond, well and truly convey or cause to be conveyed by a good and valid conveyance to plaintiffs, for ever, the steamboat, and the absolute title to the same, free from all incumbrances, and so that the plaintiffs should thenceforth stand and be absolutely possessed as of their own property of the said steamboat free from all claim, demands and incumbrances legal or equitable, except incumbrance by plaintiffs; and if plaintiffs should at all times after the making of that obligation, peaceably and quietly have, hold, use, and enjoy the said steamboat without the let, suit trouble, hindrance, denial, interruption, molestation, claim, or demand whatever, of, from, or by, any persons whomsoever lawfully claiming or to claim, and if the obligors, did at all times thereafter secure, place, retain, protect, warrant and defend the plaintiffs in the full and free possession and quiet enjoyment as of their own property of the said steamboat against all claims and demands whatever, from or by any person lawfully claiming or to claim, then the obligation to be nul and void. And it was further declared that loss by fire or any other cause should avoid the obligation. Averment that the steamboat has not been lost by fire or any other cause. First breach—that neither defendants nor any other person did, within the three calendar months, or at any time since convey, or cause or procure to be conveyed, to plaintiffs, the said steamboat in the said condition mentioned, or the absolute title to the same free from incumbrances, but have wholly failed and made default. Second breach—that

the said steamboat was not, nor has been since the making of the said bond, lost by fire or any other cause. That the plaintiffs did not nor could at all times after the making of the said bond, peaceably and quietly have, hold, use and enjoy the said steamboat without the let, suit, trouble, hindrance, denial, interruption, molestation, claim or demand of any person lawfully claimed the said, but on the contrary thereof, after the making of the said bond, and before the commencement of this suit, to wit, on, &c., one O. S. Gildersleeve, wno before then, and there had, and from thence hitherto has had, and still has lawful claim, right, and title to, and lawfully claiming the same steamboat, did enter into and upon the said steamboat, and ejected, expelled and removed tne plaintiffs against their will by due process of law from the possession of the said steamboat, and thence hitherto hath held and kept possession thereof, and has excluded the plaintiffs from the possession of the said steamboat, and which claim of the said O. S. Gildersleeve was not nor has been held acquired or obtained from, through or under the plaintiffs, or any one claiming through or under them, by reason whereof plaintiffs have not only lost the said steamboat and divers sums of money by them laid out and expended upon the vessel, in repairing, amending and improving the same, and profits which they would have made in carrying passengers and freight, but have also become liable to pay the costs of a certain action of replevin brought by the said O. S. Gildersleeve, to obtain possession of the said steamboat, and have been obliged to pay other large sums of money in endeavouring to defend the said action, whereby the said bond hath been forfeited, yet defendants have not, &c.

Pleas—1st. *Non est factum*. 2nd.—To the first breach that thesteamboatwas, to the knowledge of the plaintiffs, mortgaged to the Hon. J. H. Cameron, or some persons as trustees for his benefit to secure the like sums, payable at the times and according to the tenor of the promissory notes in the alleged bond mentioned, and therefore in consideration that the obligors at the request of the plaintiffs should deliver to the said J. H. Cameron, the said promissory notes in order that the



proceeds thereof as paid to him by plaintiffs should be by him applied in satisfaction of the like sum secured by said mortgage; and in consideration that the plaintiffs would forbear to require the execution of the conveyance in the declaration mentioned, the said J. H. Cameron agreed with plaintiffs with the assent of the obligors that he or his trustees should hold the mortgage only as a security for and until payment by plaintiffs of the said promissory notes, and should, upon such payment, releases to plaintiffs the said steamboat, and the obligors, at the request of the plaintiffs, and in pursuance of the agreement, transferred the said notes to the said J. H. Cameron, who thenceforth held the said mortgage to secure payment thereof; and plaintiffs thereupon discharged the obligors from procuring the conveyance of the steamboat to be executed to the plaintiffs within three months, by the parties legally entitled to convey free from all claims and incumbrances, for which reason defendants did not, within three calendar months, &c. Third to the second breach, that after the making the said agreement, and the transfer of the promissory notes in the second plea mentioned to the said J. H. Cameron, he, for valuable consideration transferred his whole interest in the mortgage and notes, and the agreement to the said O. S. Gildersleeve, and thereupon, while the said O. S. Gildersleeve was the holder of the said notes, and the assignee of the said mortgage and agreement in the same manner as the said Cameron held the same, the plaintiffs made default by non-payment of one of the said promissory notes, according to the said agreement, and the said O. S. Gildersleeve thereupon brought the action of replevin to enforce the performance of the said agreement by the payment of one of the said notes as he well might by reason of the said default of plaintiffs to perform the said agreement. And so defendants say that the said O. S. Gildersleeve obtained possession of the steamboat, claiming the same or an equitable interest therein by virtue of the said agreement.

The plaintiffs joined issue on the pleas, and demurred also to the second and third.

The cause was tried at Toronto in May last, before the

Chief Justice of Upper Canada. The bond declared upon was produced, and the execution of it proved. At the foot of it was the following memorandum, written and signed by Mr. Cameron: "I undertake to release the mortgage I now hold upon the City of Hamilton, or to hold the same for the payment only of the notes in this bond recited whenever the bill of sale is made by Donald Bethune & Co."

It appeared that at, and prior to the date of the bond, Cameron held a mortgage upon the steamer, of which the plaintiffs only became aware just before completing the purchase, and in consequence thereof refused to go on until an arrangement was made on the part of some of the defendants with Cameron by which they (the defendants) would be enabled to complete their sale to the plaintiffs. And an agreement was entered into between Cameron and defendants, the purport and effect of which is stated in the memorandum subjoined to the bond, after which, and after the execution of the bond, though upon the same day, the following receipt was given:—

"Toronto, 23rd of May, 1854. Received from Mr. Alexander Steward, £1,000 (one thousand pounds) in cash, three notes for four thousand pounds in all, an agreement signed by him and others, and a power of attorney, to be applied to the payment of money due by Mr. David Paterson, (one of the obligors in the bond, deceased, and not included in the suit) on account of D. Bethune & Co., to the Commercial Bank, and the notes to be returned to D. Bethune & Co., whenever notes to the amount of four thousand pounds made by Mr. Wilson of Quebec, and endorsed by G. F. Noad & Co., are given to me." (Signed.

J. HILLYARD CAMERON."

A conveyance, dated in May, 1854, purporting to be under the hand and seal of D. Bethune, and also of D. Bethune & Co., transferring the steamboat City of Hamilton, was produced by the plaintiff's attorney, who stated that one of the defendants had handed it to him in January or February, 1857, but without any proof of its execution, and there was no subscribing witness to it.

From the certificate of ownership it appeared that the steamboat was first registered on the 6th of December, 1850, to the Messrs. Davy, who in January, 1851, transferred to

Donald Bethune. & Co., and a mortgage was executed and endorsed on the certificate in January, 1853, to James Cotton, from D. Bethune & Co.

A judgment was proved, *Dickie v. Bethune*, and a *fi fa.* thereon, under which the sheriff of Frontenac sold the boat for £10, on the 12th of May, 1856, and his vendee immediately transferred his interest to O. S. Gildersleeve. The conveyance by the sheriff and the transfer to Gildersleeve were both endorsed on the certificate of ownership. The plaintiffs, however, still remained in possession, until Gildersleeve brought an action of replevin, under the writ in which action he at once dispossessed the plaintiffs, and afterwards obtained judgment in that suit.

Cotton, in 1854, assigned his mortgage to Cameron and others, who assigned in April, 1856, to Gildersleeve, which assignments were duly registered.

The plaintiffs proved that they expended about £600 in repairs and improvements of this boat while in their possession, and they claimed the sum of £6000 (with interest), as the amount they had paid for the boat, and the value of substantial and continuing repairs and improvements, of which they had lost the benefit.

On the defence, it was proved that Cotton had assigned his mortgage to Mr. Cameron and others, as trustees for other parties, in effect to secure the payment of £3,750, with interest. Mr. Cameron stated that he discounted the plaintiffs' promissory notes, and so acquired them; that if Wilson's notes, endorsed by G. F. Noad & Co., had been substituted, he would have taken them and released the mortgage, but that it was well understood that so long as he held plaintiff's notes he would retain the mortgage as additional security, and he would have done so if he had not discounted the notes; that neither the first nor the second notes were paid when due, and they were put in suit, and that before the last note became due he assigned it, and his interest in the £1,500 note, which was in suit to O. S. Gildersleeve, and with the other trustees transferred the mortgage on the "City of Hamilton" to him, on the 20th of April, 1856. The first note (for £1000) was paid in full, and a portion of

the second note had been paid before the assignment to Gildersleeve; but this payment seems to have been made under the following circumstance: Mr. Cameron and a co-trustee had recovered judgment, and issued execution against the plaintiffs on the first note given by them for £1000. And the plaintiffs' interest in the boat was sold on that execution to Gildersleeve for £1,060, which he actually paid on the assumption and belief that the boat had been conveyed to them. But when it was discovered that the plaintiffs had no title at all, but only the defendants' bond to procure one, Gildersleeve claimed his money back, and an arrangement was made between him and Cameron, and the money paid by him was applied towards the purchase of the mortgage held by Cameron and others on the boat. Afterwards the execution in the suit (*Dickie v. D. Rethune*), came into the sheriff's hands, under which D. Rethune's remaining interest in the boat, subject to the mortgage, was sold for £10, and was immediately transferred to Gildersleeve. The plaintiffs have paid the full amount of these notes, less the £1060 thus paid by Gildersleeve, which they contend must be treated as money made on the execution against them, but which he claims from them, as he got no benefit whatever by his bid for their interest, and rested his claim to the boat, as assignee of the mortgage to Cotton, and purchaser under *Dickie's* execution. Evidence was also given on the defence of the depreciated value of steamboat property, and that notwithstanding repairs, she was of less value when Gildersleeve took possession of her, than when plaintiffs bought her; and it was insisted also that they had run her for some time.

The learned Chief Justice directed that the second plea was not proved, and he left the third plea to the jury with a direction that there was evidence to sustain it; and as to damages, he was of opinion that on this bond the plaintiffs were entitled to recover whatever money they had paid in reliance on that security, less the depreciated value of the boat accruing during the time that plaintiffs had the actual possession and use of her, with interest from the time the plaintiffs were deprived of her.



The jury found for the plaintiffs on the first and second pleas, and for defendants on the third, and assessed damages on the first breach at £6,675, explaining that they gave £300 as for the improvements made by plaintiffs in the engine, and 1s. damages on the second breach.

In Trinity Term last, *A. Macdonald*, obtained a rule *nisi* for a new trial, on the grounds that the jury were misdirected as to the second plea, and also as to the true measure of damages, insisting that the jury should have been told the plaintiffs could still redeem the boat, and that the measure of damages was the sum necessary to pay off the incumbrance, and that it ought to have been left to the jury to consider in mitigation of damages, that the plaintiffs lost possession of the steamboat by their own default in not paying their notes, and that the possession and use of the steamer ought to have been left to the jury, in mitigation of damages.

The rule was argued in Michaelmas Term by *A. Wilson*, Q. C., and *S. Richards*, for plaintiffs, and *Connor*, Q. C., and *McDonald*, for defendants. For the plaintiffs were cited, *Burgh v. Preston*, 8, T. R. 483; *Norton v. Wood*, 1 Russell & Milne, 178; *Robinson v. Harman*, 1 Ex. 855; *Pounsett v. Fuller*, 17 Com. B. 677; *Gildersleeve v. Corby et al.*, 15 U. C. Q. B. 150. For the defendant, *Cranstown v. Johnston*, 3 Vesey, 170; *Otter v. Vaux*, 2 Kay & Johnston, 653, affirmed in appeal, 3 Jur. N. S. 169; *Myers v. Willis*, 17 Com. B., 77, affirmed in appeal, 18 Com. B. 886.

DRAPER, C. J., delivered the judgment of the court.

The decision which we have given on the demurrer as to the insufficiency of the pleas, as a defence to the action, renders it unnecessary for us to consider any question but that of damages. The plaintiffs in the first breach have established a right to a complete indemnity. There is no defence established sufficient to qualify this right. Then what is their position? Upon the facts proved, they appear to have paid the sum of £6,000, the purchase money of the vessel. They were entitled to receive a conveyance free from incumbrance, at the expiration of three calendar months from the

date of the bond sued upon. At the time of the execution of that bond, it is true, they were made aware of the existence of a mortgage on the boat, and were also aware that the mortgagee had declared himself ready and willing to take the payment of £1,000 in cash, and of their notes for £4000, as they fell due in satisfaction of this mortgage. And if the conveyance of the boat had been duly made to them, subject only to the satisfaction of the mortgage by the payment of their notes, the circumstances which have given rise to this action would possibly never have occurred. For in such case, at all events, there would have been no interest remaining either in Donald Bethune or Donald Bethune & Co., which could have been made the subject of a sheriff's sale. But no such conveyance ever was made, and though as a consequence the attempted sheriff's sale of the boat, on a judgment recovered against them, proved a nullity, because they had no title whatever saleable under a *fi. fa.*, yet the outstanding title of D. Bethune was saleable, and being sold, gave the purchaser a right of possession as against them who had no title at all. This result appears to me to have followed directly from the breach in not conveying, and without reference to the question of incumbrance. I do not see how, sitting in a court of law, we can hold these plaintiffs entitled to claim the boat by any act of theirs, by virtue of any title which we can see they are entitled to set up and enforce. They stand, on the contrary, in the position of parties who, having paid the purchase money, have acquired nothing in exchange, and if so their right to recover their purchase money would appear unquestionable. For, admitting to the fullest extent, the force of the argument, that the mortgage held by Mr. Cameron must be deemed satisfied by the payment of the notes of plaintiffs, which were transferred and delivered to him, the plaintiffs cannot get the advantage of such satisfaction, it does not relieve their title from incumbrance, for they have no title; and if Gildersleeve's title is imperfect or even void, the defendants, or rather Donald Bethune & Co., would be the parties benefitted by the extinction of the mortgage. I do not perceive that the fact that the plaintiff received,

and for a few months retained possession of the boat, can affect their right to recover the money they paid as a consideration for a title which they have never obtained. For it is not a case in which a perfect title passed by the act of delivering and taking possession. It more resembles the case of land, where after entry, the purchaser has been evicted on a total failure of title. The purchase-money in such a case is recoverable, and I think interest from the time that possession has been lost, and I see no reason for a different rule in the present case.

The allowance for damages on account of the value of substantial and lasting repairs made by the plaintiffs while in possession, and with a view to the further enjoyment and use of the steamboat, is also, in my opinion, correctly made, on the principle, that from the very nature and character of these transactions, such repairs must be deemed to have been necessary, whoever was the owner of the vessel. The plaintiffs must be looked upon as authorised to make such repairs at once, without delaying for the period of three months, at the expiration of which they were to get a good and valid title free from all claims and incumbrances; against this claim the use and profit actually derived during the time the plaintiffs had possession, was to be considered, and a proper deduction being made on this account, which was a matter for the jury, the residue would be a loss sustained by the plaintiffs from not getting the title they stipulated for. Into whatever hands the steamboat passed, when the plaintiffs were deprived of her, she was worth just so much more than she would have been had no such repairs been made. Any improvement in her value, anything beyond the mere keeping her from deterioration, was the result of the outlay made by the plaintiffs, and became a loss to them when she was taken from them, and was recoverable in this action.

I am of opinion, therefore, that the rule should be discharged.

Rule discharged.

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### DAVENDORT V. DAVENPORT.

*Dower—Alien—Seizin.*

*Held*, that the widow of an alien is entitled to dower in real estate in Upper Canada, of which her husband had been seized during his lifetime.

This action was brought to recover demandant's dower in

one undivided half of part of lot number eighty-one in the first concession of the township of Sandwich, of the endowment of Lewis Davenport, her late husband. Plea, *ne unques seizie que dower*.

At the trial at Sandwich fall assizes, 1857, before *McLean*, J., it was proved that Lewis Davenport was seized in fee of the land by deed dated the 27th day of August, 1834, and it was admitted that Lewis Davenport was an alien, and died in 1848. It was also proved that the tenant derived his title by deed from said Lewis Davenport, memorial dated 2nd April, 1848. Whereupon tenant's counsel objected that demandant's husband could not be legally seized, being an alien.

Demandant's counsel contended, first, that an alien could hold such an estate, that his widow could be endowed therof; and secondly, that if he could not, still the tenant deriving his title from him, was estopped from denying his seizin.

A verdict was taken for demandant, subject to the opinion of the court on these points.

*Prince*, A., for demandant, cited *Doe Richardson v. Dickson*, 2 Old S. 292; *Doe dem. O'Connor v. Maloney*, 9 U. C. R. 251; 12 Vic., ch. 197, sec. 12, and *Doe Lount v. Simpson*, 9 U. C. 544.

No one appeared to support the tenant's case.

DRAPER, C. J., delivered the judgment of the court.

The demandant's husband, according to the case, was seized in fee of the land in question by a sufficient conveyance, but was an alien. Notwithstanding this, *Doe Richardson v. Dickson* (2 Old Series Reports, 292,) and the numerous cases therein cited shew that the estate would pass to him. The case of *Doe MacDonald v. Cleveland* (6 Old Series Reports, 117,) goes even further, for there the court held that the grantee of an alien could maintain ejectment to recover possession of the premises conveyed. In that case the defendant had himself made the conveyance to the alien, a fact strongly commented on by the learned Chief Justice in giving judgment.

No personal disability is asserted against the demandant. She must be taken to be a subject of her Majesty, married to an alien, who in 1834 purchased real estate in Upper Canada.

In April, 1848, her husband sold that same estate to the



defendant, who has held it (I presume) under that conveyance. It is as tenant of the freehold that he defends this action, and the only title he has is that derived from demandant's husband. Upon the principal of the two cases adove referred to, and especially the latter, there is no doubt in my mind the defence fails.

Judgment for plaintiff.

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WHITTEMORE ET AL. V. LINES ET AL.

*Promissory note—Endorsees—Release.*

The plaintiffs and one of the defendants, G. S. W., having large business transactions, were in the habit of striking a monthly balance, and the latter giving to the former a due bill for the amount found due, which *amount* was then brought forward and formed the first item in the account for the next month, and the promissory notes which had fallen due the previous month were still held as security by the plaintiffs. The note sued on in this cause formed an item in one of these monthly accounts, and the maker (it being an accommodation note) and second endorser contended that, as time had been given to the party really liable to pay the note, they were released.

*Held*, that all the deiendants were liable.

The action is on a promissory note for £316 5s., made by Lines, payable to the defendant George S. Wilkes, and endorsed by him to the defendant Frederick T. Wilkes.

The defendant Lines pleads, that he made the note without consideration, and for the accommodation of the defendant George S. Wilkes: that after the note became due, the plaintiffs being the holders of the note, stated and settled an account between themselves and the said George S. Wilkes, respecting divers accounts, including the said note, and the plaintiffs then debited the said George S. Wilkes with the full amount of the said note, and for the balance then found due upon such account from George S. Wilkes to plaintiffs, the said George S. Wilkes drew, and the plaintiffs accepted and received from the said George S. Wilkes another promissory note or due bill of the said George S. Wilkes, for £2938, payable to the plaintiffs or order one day after date, in full satisfaction and discharge of the balance then found to be due, including the amount of the promissory note in the declaration mentioned.

The defendant Frederick T. Wilkes pleaded a plea similar in substance, averring the giving by George S. Wilkes, and

the acceptance by plaintiffs of a due bill payable one day after date, for £500, in full satisfaction and discharge.

The plaintiffs took issue on these pleas. The defendant George S. Wilkes let judgment go by default.

The case was tried before *Burns, J.*, when it appeared in evidence that the note was made and endorsed for the accommodation of the defendant George S. Wilkes: that he was dealing and had large transactions with the plaintiffs, and lodged this and other notes with them as security for advances they were making him, but it was not shewn that they were made aware that the defendant Lines made this note for the plaintiffs' accommodation. The plaintiffs gave George S. Wilkes credit for the amount of these several notes in account current, and he drew on them for money as he required, against what stood at his credit. If the notes were paid at maturity they would be carried to his credit, but if not paid they would be debited to him, but would still be left in plaintiff's possession. Every month the balance was struck between him and plaintiffs, and he gave them a due bill for what then appeared due at one day's date; and so the accounts went on from month to month—the *balance* due at the end of one month, for which a due bill at one day was given, forming the *first item of debt* in the next month's account, as a balance brought forward from the last account. The note sued on, dated 1st of December, 1856, fell due on the 4th March following. On the 17th April, 1857, a monthly settlement took place, in which defendant George S. Wilkes was charged with the note as £317, including protest and interest, and he then gave a due bill for £293<sup>8</sup>, the balance due on that account, and that balance has been carried forward, and at the next account he gave a similar due bill for the balance then struck, and so on during their dealings. The defendant George S. Wilkes gave the foregoing account, being called as a witness for the other defendants, and he added that he left the notes in the plaintiff's possession as security for his balance. The jury in reply to a question from the learned judge, said that the note was left in the plaintiff's possession as a security for the balance due, and found for the plaintiff, subject to the opinion of the court.

*W. H. Burns* for plaintiffs, cited *Bank of U. C. v. Sherwood*, 8 U. C. Q. B., 116 ; *Philpot v. Briant*, 4 Bing., 717.

*M. C. Cameron* for defendants, contended that two parties striking a balance cannot afterwards go behind it and sue on an item contained therein.—*Melville v. Carpenter*, 11 U. C., 133 ; *Beattie v. Hatch*, 12 U. C., 195 ; *Gould v. Robson*, 8 East. 576 ; *Fraser v. Jordan*, Jurist 7 Nov., 1857, p. 1054.

DRAPER, C. J., delivered the judgment of the court.

The defence raised upon these pleas amounts to this, that the plaintiffs accepted from George S. Wilkes, who was also liable on this note, another note for a larger sum, payable at one day after date in full satisfaction and discharge of the note sued on. This is the sole effect of the pleas, in other words, the maker and second endorser plead to an action by the second endorsees and holders—that the payee and first endorser gave his promissory note, and that plaintiffs accepted it in satisfaction. The question we have to decide is, not whether this is a good defence in law, or whether it is well pleaded, but whether upon the evidence the jury were warranted in the conclusion they came to, against it. The pleas are not framed so as to rest the defence upon time being given whereby the defendant's pleading were discharged, nor upon the allegation that this note and various other accounts had been brought into a general accounting when a balance was struck between the plaintiffs and George S. Wilkes, which balance George S. Wilkes had promised to pay, which settlement, upon the authority of *Smith v. Page*, 15 M. & W., 683 ; *Melville v. Carpenter*, 11 U. C. Q. B., 133, and *Beattie v. Hatch*, 12 U. C. Q. B., 195, would preclude the plaintiffs from going back to their original transactions, as their cause of action, at least as between themselves and George S. Wilkes. These considerations, which were urged and relied upon, were only important so far as they had any bearing upon the matter really in issue, namely, the acceptance of another note of George S. Wilkes in satisfaction.

The evidence of George S. Wilkes only speaks of one particular due bill, namely, that for £2938, which was given at the striking of the monthly balance, of 17th April. The

plea of Frederick T. Wilkes is of the giving and acceptance in satisfaction of a note for £500. This is, I presume, a note or bill given for a later—perhaps the final balance—but if the note had been satisfied as to the maker on 17th April, it must have been satisfied also as to all other parties, and then the plea of the second endorser is not proved—for the note sued on was not satisfied as that plea states.

But on the plea by Lines the maker, I think the evidence given not only sustains the verdict for the plaintiff, but I should have thought it almost a reproach to the administration of justice had they found otherwise. As I understand the statement of the monthly accounts—these monthly due bills, so far from being treated as settling all that had gone before as between them, were not carried into the account at all, but the balance itself, not the note or due bill for it, formed the first item of the succeeding account; whereas, if the note payable one day after date had been a satisfaction and discharge of the former accounts, until that note fell due and was dishonoured, the defendant George S. Wilkes was not indebted in any sum, presently demandable and payable to the plaintiffs. This, as far as it goes, tends to shew how these two parties viewed the transaction; and when it is found that in fact the note sued on was with others held by the plaintiffs as security for the monthly balances, I think there is an end to any ground for insisting that as of right, the note or due bill of George S. Wilkes was accepted by plaintiffs, or tendered by him as a full satisfaction and discharge of this particular note.

I think the plaintiffs entitled to the postea.

The Chief Justice referred to the following cases :—*Nafis v. Soules*, 2 C. P. U. C., 412; *Bank U. C. v. Sherwood*, 8 Q. B. U. C., 116; *Philpot v. Bryant*, 4 Bing., 717; *Loomer v. Marks*, 11 Q. B. U. C., 16; *Gould v. Robson*, 8 Ea., 576; *Moss v. Hall*, 5 Ex., 46; *Lazarus v. Cowie*, 3 Q. B., 464; *Frazer v. Jordan*, 3 Jur. N. S., 1054; *Beaty v. Hatch*, 12 U. C., 195; *Melville v. Carpenter*, 11 U. C., 133.

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## WILMOT V. LARABEE.

*Ejectment—Lease—Estate.*

The plaintiff, by indenture, dated 6th of April, 1854, did "demise, lease and to farm let," the land in question to the defendant upon the following terms, that he shall pay "all rates, levies and assessments upon the said property," enclose the same with a good fence," and "farm the same in a husbandlike manner." The plaintiff covenanted for himself, his heirs and assigns, to rent unto the defendant (the premises) at the rate of six pence per acre, payable in advance." There was no livery of seizin—nor any time mentioned.

*Held*, that an estate at will only passed.

EJECTMENT for the south twenty-five acres of lot No. 31, 3rd Con. Township of Clark, plaintiffs title not disputed, but defendant set up that on the 6th of April, 1854 (by indenture of that date) "the said Samuel Street Wilmot, his heirs and assigns doth thereby lease, let, and to farm let" the said twenty-five acres to the defendant, who "shall pay all rates, levies, and assessments upon said property," "enclose the same with a good fence," farm the same in a husbandlike manner," and shall not transfer the lease without the written consent of the lessor. And the lessee acknowledges the lessor to be the true and rightful owner. "And the said Samuel Street Wilmot for himself, his heirs, and assigns, doth hereby rent unto the said defendant, the said above described twenty-five acres at the rate of six pence per acre per annum, payable half yearly in advance." A verdict was taken for the plaintiff subject to the opinion of the court. If the court shall be of opinion that the estate created by the above-recited instrument is a lease for years, then the verdict to stand, but if the estate created is a lease for the life of the grantee then the verdict to be entered for the defendant.

The case was argued in Michaelmas Term. *Galt*, for the plaintiff merely stated that for want of livery there was no estate for life.

*M. Vankoughnet*, contra, argued that the entry of the tenant was tantamount to livery, and then the leave would convey an estate for life, citing Co. Lit. 426; *Watkins conveying*, 33.

DRAPER, C. J., delivered the judgment of the court.

The question for the decision of the court does not in

terms embrace the possibility of the determination being that the estate created is neither for life nor for years. Not for life, for want of livery, nor for years, because the determination is uncertain. The intention of the parties, I take to be, that of a less estate than for life is conveyed, the verdict is to stand.

There can be no estate created for life if there be no livery, nor anything that would be equivalent to it, as if the conveyance could take effect under the statute of uses, which would be equivalent to livery at the common law to transfer the freehold. For estate of inheritance or estate for life cannot by common law be conveyed without livery of seisin, and the deed here cannot operate under the statute. The same investiture or livery of seisin is necessary to create an estate for life that is required to create an estate in fee.

But it is no part of the case submitted, that there was any formal livery either in deed or in law. The argument of the defendant's counsel was based on the admission that there was none, for he urged that the entry of the tenant was tantamount to livery, and rested his case there, which seems therefore to be the sole question. "In all cases where livery of seisin is requisite and it is not made, there doth pass no estate, but an estate at will at the most." Where there is a feoffment executed, if the feoffee enter before livery he is no disseisor, for the deed is good, and the agreement of the party accords with the law, and it may be made good by livery of seisin subsequent. A delivery of the deed even upon the land, unless delivered in the name of seisin of the land, will not operate as livery of seisin. And where the party seised in fee simple, being on the land, demised to the plaintiff for life, but there was no other livery of seisin, it was held this was no good lease—*Sharp v. Sharp*, Cro. El. 482, and *Sharpe's case* 6 Co. 26, confirms the doctrine, and shews that the words, "I do hereby demise unto you my house for the term of your life," constitute a good beginning, and will avail if he makes an actual livery accordingly, but without livery it amounts to a lease at will. Bare words of limitation without some act or words shewing a delivery of the possession by the feoffer or lessor are ineffectual. And

the act of the feoffee or lessee, without livery in deed or at law by the feoffer, cannot give operative effect to the deed. As where the plaintiff was seised of land in fee and the tenant drew a feoffment of the land in view, &c., *habendum* to the tenant and his heirs, and the tenant delivered the charter to the plaintiff and prayed him to deliver seisin in the same land, and the plaintiff would not deliver seisin *but he delivered back the charter* to the tenant upon the land, *and the tenant kept himself in*; it was held there was no delivery of seisin, although if the plaintiff when he delivered the charter to the tenant had said, "I deliver you this charter in the name of seisin of all the lands and tenements contained therein," it had been otherwise. If the deed without livery gives only an estate at will, the bare entry of the tenant without livery cannot enlarge that tenancy into one for life.

I think, therefore, the verdict for the plaintiff should stand.

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## HILARY TERM, 21 VICTORIA.

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Present.—The Hon. WILLIAM HENRY DRAPER, C.B., C.J.

" WILLIAM BUELL RICHARDS, J.

" JOHN HAWKINS HAGARTY, J.

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## SUTHERLAND V. THE GREAT WESTERN RAILWAY COMPANY.

*Common carriers—Free tickets—Damages.*

The defendants gave a free ticket for the year 1857 over their railway in these words, "Pass Captain James Sutherland free between any station, and any station from the 1st of January 1857, to 31st of December, 1857. This ticket is not transferrable, and the person accepting it assumes the risk of accidents and damage." Captain Sutherland was killed while passing over the railway from the giving way of a bridge over the Desjardins canal, and his administrator brought an action for damages under 10 & 11 Vic., ch. 6.

*Held*, that the defendants were authorised to enter into a special contract, and were not liable for damage or injury arising to the party holding such a ticket while travelling under it.

The declaration alleged that the defendants were the proprietors of a railway, and carriages for the convey

ance of passengers for hire and reward, and thereupon it became their duty to make the bridges of their railway strong and safe, and at all times to keep said bridges in a strong and safe state and condition, and that the testator, at the defendants' request, became a passenger in one of the said carriages, to be by them safely and securely carried and conveyed from Toronto to Hamilton for certain reasonable reward and it thereupon became the duty of defendants to use due and proper care and skill in and about the carrying and conveying the said testator; but the defendants, not regarding their duty, did not make their said bridges safe, nor did they use due and proper skill in and about the carrying and conveying, &c., but on the contrary, took so little care, and so negligently and unskillfully conducted themselves in making, working, &c., that the engine and locomotive by which the said defendant was conveyed, broke through the Desjardins canal bridge, and the carriage in which the said testator was a passenger, fell into a certain water course, &c., whereby testator was killed.

The plea denied that the testator was a passenger for reward, but on the contrary, the testator, on the occasion in the declaration mentioned, became and was received as a free passenger on the said train of carriages without reward, and upon a special contract, viz., that the said testator in consideration of the defendants' permitting him to enter the said train of carriages of the defendants as such free passenger, undertook and agreed with defendants to assume all risk of accidents and damages which might occur to him, which contract was contained in a certain free pass ticket in the words and figures following: "Great Western Railway, No. 674. Pass Captain James Sutherland free between any station, and any station from 1st of January 1857, to 31st of December, 1857. (Signed). C. Bridges, Managing Director. This ticket is not transferrable, and the person accepting it assumes the risk of accidents and damages." And the testator was on the occasion of such accident travelling as such free passenger.

The plaintiff demurred on the ground that the matter set



forth in the plea shewed no good legal answer to the plaintiff's complaint.

*Eccles*, for the demurrer, cited, *Davies v. Mann*, 10 M. & W. 546; *Carr v. The Lancashier and Yorkshire Ry. Co.*, 21 L. J. N. S. Ex. 261; *Parr v. Anderson*, 6 East 204; *Bodenham v. Bennett*, 4 Price 31; *Birkett v. Willan*, 2 B. & Al. 356; *Balson v. Donovan*, 4 B. & Al. 21; *Garnett v. Willan et al.*, 5 B. & Al. 53; *Wright v. Snell*, 5 B. & Al. 350; *Duff et al v. Budd*, 3 B. & B. 177; *Brooke v. Pickwick*, 4 Bing. 218; *Wyld v. Pickford*, 8 M. & W. 443; *Hinton v. Dibbin*, 2 Q. B. 646; *Owen v. Bennett*, 2 C. & M. 353; 10 & 11 Vic. c. 6.

*Gwynne*, Q. C., in support of the plea referred to *Angell on Carriers*, 255, et seq.; *Theobald v. Railway Passenger Assurance Co.*, 23 Law Journal, Ex. 249, 10 & 11 Vic. ch. 6.

DRAPER, C. J.—The case was argued before us, on behalf of the plaintiff, upon the assumption that at the common law, the duty and liabilities of carriers of passengers and carriers of goods, both being common carriers, that is, persons exercising the business of carrying as a public employment, undertaking to carry goods or persons generally, holding themselves out to engage in such carriage as their general occupation, and to receive hire and reward in consideration thereof, were identical. It was then argued that though a common carrier might limit his liability to some extent by express notice to the party whose goods he undertook to carry, yet such limitation did not affect the principal of his responsibility at common law, and that until the statutes 11 G. & 1 W. 4, they could not in England enter into a special contract at variance with that common law liability. That no corresponding statute was in force in this province, and therefore this case must be disposed of in accordance with cases decided in England *before* and not since the passing of that act.

As early as the case of *Kenrig v. Eggleston* (Ayleyn. 93), it was held the carriers might make a special acceptance of goods, and the case cited by Hale, in 1 Ventres 238, is to the same effect. And the principal of these cases is enunciated and truly set forth in *Tyly v. Morrice* (Carthew 485), that

the liability of the carrier is founded only on the reward. The doctrine that a common carrier may make a special acceptance and a special contract in reference to the value of the goods he undertakes to deliver and the reward he is to receive is confirmed in *Gibbon v. Paynton* (4 Burr. 2299), where the preceding cases are cited, Lord *Ellenborough* in *Nicholson v. Willan* (5 Ea. 513) observes, "There is no case to be met with in the books in which the right of a carrier to limit by special contract his own responsibility has ever been by express decision denied," and that the legislature "rejected a bill brought in for the purpose of narrowing the carriers' responsibility in certain cases on the grounds of such a measure being unnecessary, inasmuch as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract," and this was in a case where the loss happened by a negligent discharge of their duty as common carriers.

The result of the cases is thus clearly summed up by *Best, C. J.*, in *Riely v. Horne* (5 Bing. 224), "A carrier is an insurer of the goods which he carries,—he is obliged for a reasonable reward to convey any goods to the place to which he professes to carry goods that are offered to him if his carriage will hold them, and he is informed of their quality and value. He is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are. If he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be. He may limit his responsibility as an insurer by notice, but a notice will not protect him against the consequences of a loss by gross negligence."

There is, however, a difference between carriers of persons and the carriers of things. Lord *Kenyon* in *White v. Boulton* (1 Peakes, 113) says, "when these (mail) coaches carried passengers, the proprietors of them were bound to carry safely and properly," a duty going no farther than that imposed by law on *special* or private carriers of goods for hire, as distinguished from *common* carriers. But these latter are responsible for all damage, except such as arise

from the act of God and the Queen's enemies. Against all other risks they are insurers. It is obvious upon reason and observation, this cannot be true as regards passengers. They do not insure them against every casualty, but these excepted in the case of goods, but are only liable so far as any authorities extend for accident or damage, the result of their want of care, diligence, and skill. Sir *Jones Mansfield*, C. J., in *Christie v. Griggs* (2 Camp. 80), said, "There was a difference between a contract to carry goods and a contract to convey passengers. For the goods the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore if the breaking down on the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

It is enough to refer to the foregoing summary, to shew that the duty and liability of a common carrier of goods and of persons, is not the same. Each passenger may be looked upon as contracting for his own transport, and as a being possessed of life and intelligence, he may, by his own acts, expose himself to accidents in the course of transport, or increase the risk to which every person or thing carried is exposed. But one principle of responsibility is common to the carriage of passengers or of goods, and that is the reward which the carrier is entitled to demand. This is the true ground on which his liability rests.

The argument in support of the demurrer has been rested entirely on the ground that the defendants are liable as common carriers. The first question raised by Mr. *Eccles*, whether a party who is allowed to go by the railway free of charge can maintain any action for negligence does not, it appears to me, necessarily arise on this demurrer. The case of *Collett v. London and North Western R. W. Co.*, 16 Q. B. 984, is an instance to shew that the payment of reward by the plaintiff for his being carried, is not in all cases indispensable, and that a duty may arise to the public for a neglect of which

the plaintiff, as a servant of the public, may recover compensation though there was no contract between him and the R. W. Co. The case of the Great Northern R. W. Co. v. Harrison (10 Exch. 376), turned on the issue raised, which was, whether the plaintiff was lawfully in the carriage, having a free ticket, but one in which another person's name was inserted. No other question as to the Railway Company's liability is raised in that case.

There is no obligation on the defendants to carry passengers free; and if they do so, it cannot be said they incur a greater obligation than the agreement to carry free expressed. I am, therefore, at a loss to understand the principle upon which it is contended that they are precluded from entering into a special contract with a party from whom they claim and receive no payment, as to the liabilities to him which they will or will not undertake. Admitting that if nothing more appeared than that they carried him free, they might still be liable to recompense him for an injury arising from their negligence, it does not follow that they may not stipulate with him that in consideration they gave him a free passage, he shall assume all risks of accident without recourse against them. If he pays, or offers to pay the usual fare, he has the right to compel them as common carriers to convey him and to be responsible for any injury he sustains by their default, but he can have no right to be carried free, but by agreement, and then they have a right to say on what terms they will agree with him. The argument founded on defendants' liability as common carriers is, therefore, I think, completely answered when it is shewn that the passenger travelled by virtue of a ticket entitling him to pass free from any station to any other station for a year, and on which ticket was this memorandum: "This ticket is not transferrable, and the person accepting it assumes the risk of accident and damages." I think the company had a legal right to make such a contract, and that it is an answer to an action such as this is.

The declaration contains the allegation that the defendants were the proprietors of the railway and carriages for the conveyance of passenger for hire and reward, and



thereupon it became their duty to make the bridges of the railway strong, and at all times to keep them in a safe state. It also alleges that the plaintiff's testator, at the defendants' request, became a passenger in one of the carriages to be safely and securely conveyed, for certain reasonable reward, to be paid to them, *whereupon* it became their duty to use due and proper care in and about the carrying the plaintiff's testator. Yet, that defendants, not regarding their duty, did not make the bridges safe, nor did they use proper care in carrying the plaintiff's testator, but on the contrary, &c., whereby plaintiff's testator was killed. The plea denies that the plaintiff's testator was a passenger for hire; but that on the contrary he was a passenger travelling free by virtue of a free pass ticket in force for a year, and which was given him on condition of his assuming the "risk of accidents and damages."

Whether the defendants are to be looked upon in the light of proprietors of the railway or as common carriers, if indeed the distinction arises on this declaration (See *Palmer v. Grand Junction R. W. Co.* 4 M. & W. 749), the plea appears to me equally to answer it, and to be a bar to the action. In either case the alleged duty is answered by shewing an express contract from which no such duty arises.

A further question was raised, whether, assuming that the deceased, had he survived the accident, could have maintained no action for it, the present action given under the statute, for the protection of certain of his relations, is barred. The words of the act are, whensoever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is *such* as would (if death had not ensued) have entitled the party injured to maintain an action," then the wrongdoer shall still be liable in an action brought by the executor or administrator of the party killed, and it was argued the word "*such*" means. if the wrongful act were of such a character that the injured party could sue, then the executor, &c., may sue. The case of *Tucker v. Chaplin* 2 C. & K. 730, and *Aarsworth v. The S. E. R. W. Co.* (11 Jur. 758), appear to me clearly to shew that in the present case that had the deceased survived the accident,

he could not have recovered, and that the right of the executor or administrator is not more extensive than that of the party injured would have been.

I think, therefore, judgment must be given for the defendants, on this demurrer.

RICHARDS, J.—The first question for us to consider is, whether the plaintiff under provincial statute 10 & 11 Vic. ch. 6, can maintain an action if the intestate himself in the event of his having been injured, and not killed by the accident, could not recover against the defendants for such injury. The first section of the act provides that whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recovered damages in respect thereof, *then and in every such case* the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amounts in law to felony." It is suggested that the word "*such*" in reference to the wrongful act or default refers simply to the nature of the act, and not to all the circumstances under which it took place, and that the intestate himself might have been precluded from bringing the action; yet, if the nature of the act were *such* as to justify the bringing of an action, the plaintiff could recover though the intestate might have entered into some agreement which would have estopped him from recovering. It seems to me the plain meaning of the statute is, if the intestate could not have recovered if he had been injured and not killed, then his executor or administrator cannot recover in the event of the injury resulting in death. When the intestate himself produces the result by his own negligence or want of care, it is laid down that he cannot recover.

The language used by Lord Wensley Dale, in *Aarsworth v. The South Eastern Railway Company* reported in 11 Jurist 758, is certainly broad enough to limit the right to recover to

the extent I have mentioned. He says, in addressing the jury, the first point to be determined by you is, do you think, if the deceased had been wounded by this accident, and were still living, he could recover compensation in the way of damages against the company for the wound given under the circumstances in evidence in this cause?" See *Tucker v. Chaplin et al.*, 2 Car. & K., tried before Lord *Denman*, the head line is, "The action on the statute can only be maintained in cases where the deceased could have maintained the action if alive." In summing up, his Lordship told the jury, "The rules in actions brought under this statute by representatives are the same as in actions brought by the injured parties themselves." In each of these actions, however, the question for the consideration of the jury was, whether the deceased contributed to the accident, and it might be urged that in this way the jury might properly decide that the deceased himself by his want of care caused his own death, it was not caused by the defendant, and *such* act, viz., an act of that nature would not authorise the intestate if living to recover. It seems to me, however, to be absurd to suppose that the legislature intended to give a remedy to the legal representatives of a party to recover damages when the party himself, if living, could not recover, being precluded therefrom by his own act or agreement.

The next question is, could the intestate, if he had survived the accident, and had been injured by it, have maintained an action against the company for such injury. At common law, where a common carrier for hire receives passengers in a carriage or on board a vessel, he undertakes to use due and proper care, skill and diligence in the exercise of his calling. In the carriage of goods for hire he undertakes to carry them safely, the act of God and the king's enemies excepted. Many of the cases in England, go so far as to decide that at common law a common carrier may, by agreement, limit his liability; and if a party requires his goods to be carried under the usual common law responsibilities he should refuse to send them under the terms of a special notice or agreement, and require the carrier to take them and tender the freight, and if the carrier then refuses to

take them, he may bring an action against him for the refusal to carry. But if a special agreement be entered into both parties are bound by the terms of the contract. (See *Carr v. L. & Y. Railway Co.* 7 Ex. 707). This proposition in the way it is stated in many of the cases seems to me too broad, for if the carrier is bound to carry goods under certain responsibilities, what consideration is there suggested by the cases for a party releasing him from some of those responsibilities. I can understand that a carrier may say my rate for carrying certain descriptions of goods with my common law liabilities is so much, but if you will release me from a portion of those liabilities I will carry for so much less, then there would be proper legal consideration for the contract, or he might say, I have a right to demand any reasonable compensation for the carriage of these goods in advance, but in consideration of my waiting until the goods reach their destination, and are delivered to you, you must release me from a portion of my common law liabilities as a carrier, and if the other party assents to this, it is probable that this would be considered a sufficient consideration for such release. But on what principle a mere declaration or notice on the part of a carrier could release him from his common law liability, I am at present at a loss to perceive, or what consideration there is in such a state of facts that would, in the event of an agreement being entered into to release the carrier from some of his liabilities, make such agreement binding.

Previous to the passing of the imperial act of 1 W. IV., ch. 68, carriers endeavoured to protect themselves from liability by giving notice that they would not be answerable for packages of more than a certain value unless they were informed of the additional value, and received further compensation in consequence for their carriage thereof. They also at times gave a similar notice as to particular descriptions of goods, the carriage of which was deemed peculiarly hazardous. Often times it was difficult to shew that the party sending such goods had any knowledge of these notices and by the act referred to, after a certain day common carriers were to be held liable (except as therein provided) for



losses notwithstanding such notices; but by sec. 6, nothing in the act was to annul or any wise affect any special contract between a carrier and any other parties for the conveyance of goods and merchandise. After the passing of this statute carriers usually had a printed notice on the back of the receipts given for property to be forwarded by them, in which they stated the terms on which they carried different descriptions of goods and limited their liability. Sometimes they delivered these notices to the parties sending goods by them. The courts held that these notices, which were often signed by the party sending the goods, constituted a contract under the 6th section of the statute (in *Walker v. York and North Midland Railway* 2 E. & B. 750).

By numerous decisions since the passing of that act the courts in England have held that carriers may discharge themselves from negligence of all kinds in the carriage of, goods by the terms of special agreements thus entered into.

By imperial statute 17 & 18 Vic., ch. 31, for the better regulation of traffic on railways and canals, at s. 7, it is provided that every such company shall be liable for the loss of or for injury done to, any horses or other animals, or to any articles, goods or things in the receiving, forwarding or delivery thereof, occasioned by the neglect or default of such company or its servant, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, &c., being declared to be null and void. Provided that nothing therein contained should prevent such companies from making such conditions with respect to receiving, forwarding, &c., any of said animals, articles, goods, &c., as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable. Since the passing of this statute there have been several decisions under it which shew that the courts in England in the construing these provisions as to what are reasonable terms and conditions, seem to do so very favourably for the companies.

The question before us and the general liability of carriers in this country must be settled on common law principles

independent of the statutory provisions in England, and in referring to decisions there it is necessary to keep in mind those provisions.

At common law, as already mentioned, the carrier of goods is an insurer who undertakes to carry the same safely and securely to the place of destination, the act of God and the Queen's enemies excepted. The carrier of passengers is only liable for negligence. He does not undertake to carry at all events, but he is bound to provide proper carriages and means of transport, to employ sober and skilful servants, who are to use due diligence. If a carrier of goods may relieve himself by a contract from his common law liability *a fortiori*, I think a carrier of passengers may relieve himself by a special agreement from his common law liability arising from the want of skill or negligence of his servants. There was such an agreement entered into by the defendants and the intestate; the document referred to in the plea in my judgment constitutes such an agreement; the latter part is as follows: "The person accepting it (the ticket) assumes the risk of accidents and damages. The testator received from the defendants a ticket which would have passed him *free of charge* over their railway for a period of one year, and he accepted it on the terms of assuming the risk of accident and damages whilst travelling thereon; if the words quoted have any intelligible meaning, it is, that the person receiving it means to discharge the defendants' company from all claim for damages arising from accidents whilst travelling on their railway under the ticket. As to what is a railway accident, see *Theobald v. Railway Passenger's Assurance Co.* (10 Ex. 45).

The agreement by the defendants to pass testator free of charge over their road, when by law they were authorized to make him pay a certain sum per mile, for travelling is without doubt a sufficient legal consideration to constitute the agreement, on the testator's part, not to claim damages from them for accidents, a valid one. I do not think if testator had survived the accident he could, under that agreement, have recovered any damages from defendants for injuries he might have received in consequence of such accident, he at

the time being carried under the ticket, and if so, in my opinion, plaintiff cannot, under the statute, recover damages from the defendants, though intestate was killed by an accident which arose from the wrongful act, neglect or default of defendants.

HAGARTY, J.—Most of the cases cited in the argument refer to the duties of carriers in relation to goods. The authorities are much less numerous on the liabilities of carriers of passengers. We might err widely in assuming them to be the same. Very comprehensive words were used by *Dallas*, C. J., in *Bretherton v. Wood*, 3 B. & B. 62. “Common carriers upon whom a duty is imposed by the custom of the realm, or in other words by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law for which an action lies, founded on the common law, which action wants not the aid of a contract to support it.”

This was in 1821. In 1825, in *Crofts v. Waterhouse*, 3 Bing. 321, *Park, J.* says, “The distinction between carriers of goods and carriers of passengers was not sufficiently left to the jury. A carrier of goods is liable in all events, except the act of God or the King’s enemies. A carrier of passengers is only liable for negligence.” *Best*, C. J., says, “This action cannot be maintained unless negligence be proved.”

The distinction as to common law liability is discussed, but not decided, in *Bennett v. Peninsular Steamboat Co.* 6 C. B. 775, and some cases are quoted in argument: *Aston v. Heaven*, 2 Esp. 533. *Eyre*, C. J.—“I am of opinion the cases of the loss of goods by carriers and the present (being against a coach owner for injury to a passenger) are totally unlike. This action stands on the ground of negligence alone.” *Christie v. Griggs*, 2 Camp. 79, is to the same effect. *Sir J. Mansfield* said, “The carrier did not warrant the safety of the passengers, &c.”

In a late case, *Denton v. the Great Northern R. W. Co.*,

5 E. & B., 860, the plaintiff's counsel argued that the obligation of a carrier was to carry "according to his public profession. *Crampton, J.*, says, "Carriers of goods have that obligation,—but are there any cases shewing that there is the same obligation on carriers of passengers? A public carrier of goods must carry according to his public professions. I think, however, that there has been no decision that carriers of passengers are under the same obligation, though in *Story on Bailments*, sec. 591, it is said that they are."

The necessity of bearing these distinctions in mind arises from the nature of this case. The plaintiff says in effect, although it is true the deceased was not carried by you for hire, but on a special contract under which you agreed to carry him gratuitously, he taking on himself the risk of accident and damage, you are still by law answerable."

The law as to restricting the liability of the carrier of goods by notice seems in England to stand thus, since the 17 & 18 Vic. ch. 31, as stated by the late *C. J. Jervis*, in *London & N. W. R. W. Co. v. Dunham*, 18 C. B. 829. The result seems to be this:—"A general notice is void, but the company may make special contracts with their customers provided they are just and reasonable, and signed, and whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security that the court shall see that the condition or special contract is just and reasonable."

As we have nothing analogous to this statute we must consider the case in the state of the law prior to its passing. We would be governed by the class of cases of which *Austin v. The Manchester, Sheffield & Lincoln R. W. Co.*, 10 C. B. 454 is a good example.

Owners of cattle, received by a railway company for carriage on a ticket given to the owners declaring that the company would not be responsible for any damage, however caused, were held barred from recovering for the loss of their property under very strong circumstances of gross negligence on the part of the carriers. The case contains a very full analysis of the authorities.



*Creswell, J.*, says, "The question therefore still turns on the contract, which, in express terms, exempts the company from responsibility for damages, *however caused*. In the largest sense these words might exonerate the company from responsibility even for damages done wilfully. A sense in which it was not contended that they were used in this contract. But, giving them the most limited meaning, they must apply to all risks, of whatever kind, and however arising, to be encountered in the course of a journey, one of which undoubtedly is the risk of a wheel taking fire owing to a neglect to grease it. Whether this is called negligence merely, or gross negligence, or culpable negligence, or whatever other epithet may be applied to it, we think it within the exemption of responsibility provided by the contract, and that such exemption appearing on the face of the declaration no cause of action is disclosed, and that judgment must be arrested."

We thus find that even in the case of the carriage of goods, of which carriers for hire are as it were the insurers, an exemption from all losses, at least those not wilful, can be claimed on such a contract as is created by the pass ticket, setting forth the terms alluded to.

It has been held that carriers may protect themselves in the case of highly valuable goods unless specially booked and paid for extra. Even under the last act they might provide by signed contract that as to certain goods conveyed at special or mileage rate, they should be free from any loss or damage however caused (see *Simons v. G. W. R. W. Co.* 18 C. B. 806.)

As to the particular issue offered by defendants in this case, the case of *Shaw v. The York & N. Midland Railway Co.*, 13 Q. B., 353, is somewhat in point. *Lord Denman* then says, "It appears to us to be clear that the terms contained in the ticket given to plaintiff at the time the horses were received formed part of the contract for the carriage of the horses, and that the allegation in the declaration that defendants received the horses to be safely and securely carried by them, which would throw the risk of conveyance on the defendants, is disproved by the memorandum at foot of the

ticket, and the alleged duty of defendants safely and securely to carry and convey would not arise upon such a contract."

We have now to apply the law to the present case of carriers of passengers. First, as to the terms of the ticket set forth in this plea. It appears to me that the words, "the person accepting it assumes the risk of accident and damages," include every species of accidental loss or injury as distinguished from losses from the wilful acts of the defendants. That the words would not be strengthened by the addition of "all kinds whatever," or "however caused." for the purposes of such a claim as is set forth in the declaration before us.

On these pleadings it appears clear that the death arose from the breaking of a railway bridge, a matter clearly coming under the term "accidental." Had it not been accidental, I presume that proceedings for murder or manslaughter would be more applicable than an action for damages.

If the defendants in this case had made no special contract with deceased they would, as carriers of passengers for hire, be only responsible for negligence in fact. They were certainly not in this case carriers for hire, nor were they carriers on an implied or express contract to carry "safely and securely." The deceased in my judgment, by availing himself of the privilege of passing without charge for twelve months over their road, unequivocally released them from the legal obligation to carry safely and securely without such negligence as this declaration discloses.

The obligation to provide a sound carriage for passengers for hire is clear on all coach owners. An injury from an overturn caused by an axle taking fire from neglect of proper greasing would certainly render them responsible. I cannot understand why it is not perfectly lawful for them to agree with a passenger that they would carry him free on condition of his taking all risks from accidental causes on himself. There would clearly be an ample consideration for his so agreeing, and I think it would be strange justice to give him the benefit of the free transit and still hold the gratuitous carrier liable for a loss occasioned by the risk which the passenger so took on himself.

I consider that in the case of goods, where the carrier's liability is more extensive, it is perfectly competent for him to contract, as here, to waive his right to freight if the owner assume all risk of accident.

In the case of passenger carriage, where the liability is less extensive, it is difficult to understand why the same contract may not be equally made.

In arriving at the conclusion that the defendants are entitled to judgment, I do not overlook the principle laid down by *Park, B.*, in *Lygo v. Newbold* 9 Ex. 305. "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care." See also *Wilson v. Brett*, 11 M. & W. 113. But my decision rests on the contract set forth in the plea, by which, as I view it, the deceased took upon himself all risk from accident, including the species of injury stated in the declaration.

#### Judgment for defendants on demurrer.

The following cases were referred to:—*Crouch v. The G. N. R. W. Co.*, 11 Exch., 742; *Carpue v. The London & Brighton R. W. Co.*, 5 Q. B. 747; *Palmer v. The G. Junction R. W. Co.*, 4 M. & W. 749; *Bridge v. The G. Junction R. W. Co.*, 3 M. & W., 244; *Massiter v. Cooper*, 4 Esp. N. P. C. 260; *Sharp v. Grey*, 9 Bing. 457; *Morse v. Slue*, 1 Vent., 238; *Kenrig v. Eggleston*, Al. 93; *Lesson v. Hott*, 1 Stark. R. 186; *Nicholson v. Willan*, 5 Ea. 513; *Clay v. Willan*, 1 H. Bl. 298; *Harris v. Packwood*, 3 Tannt 264; *Riley v. Horne*, 5 Bing. 217; *Wyld v. Pickwood*, 8 M. & W. 443; *Walker v. Jackson*, 10 M. & W. 161; *Duff v. Budd*, 3 B. & B. 177; *Collett v. London & N. W. R. W. Co.*, 16 Q. B. 984; *Bretherton v. Wood*, 3 B. & B. 54, 6 Moore 141, 9 Price, 408; *Pozzie v. Shipton*, 8 A. & E. 963; *Shaw v. The York R. W. Co.* 13 Q. B. 347; *Chippendale v. Yorkshire &c., Railway Co.*, 15 Jur. 1106 *Austin v. The Manchester, &c. R. W. Co.*, 10 C. B. 454; *Morville v. The Great Northern R. W. Co.*, 16 Jur. 528; *Owen v. Burnett* 2 C. & M. 353; *Furnivale v. Coombes*, 5 M. & G. 736; *Gibbon v. Paynton*, 4 Burr. 2298; *Marsh v. Horne*, 5 B. & C. 322.

THE PROVINCIAL INSURANCE COMPANY V. ROBERT  
MAITLAND.*Replevin—Lien.*

The plaintiff's vessel, while under charter to a third party was moored to the defendant's wharf, and some fittings stored on defendant's premises, who afterwards claimed them as against the plaintiffs for wharfage of the vessel, and wood furnished during the currency of charter party. The jury having found for the defendant, a new trial was ordered.

REPLEVIN for two anchors, one cannon, one cable chain, a coffee mill, and a quantity of berths fittings of the steamer "Provincial" Avoury, because defendant was a wharfinger at the city of Toronto, and one Thomas Kidd (being lawfully in possession of the said steamer Provincial as Captain thereof, and of the said goods as belonging thereto), moored the steamer to defendant's wharf, and unshipped from the steamer the said goods, and delivered them on the wharf to defendant to be by him stored on the wharf, for certain wharfage to defendant, the said Kidd having full power so to do, and defendant received the goods upon his wharf for the purpose aforesaid, and kept them safely until the commencement of this suit, and thereby defendant was entitled to receive for wharfage, to wit, £50, and to detain the goods until the same was paid. That the said wharfage remaining unpaid, wherefore, &c., upon which issue was joined.

The case was tried before *Draper, C.J.*, at the Toronto assizes in November, 1857. The defendant began, and gave evidence, that Captain Kidd being in charge of the steamer Provincial, brought her to the defendant's wharf in 1856, during the summer, and kept her fast to the wharf for several months, and landed these goods from the steamer on to the wharf, and they were stored on defendant's premises, part on the wharf, part in a storehouse. The defendant was in the habit of charging £5 per month for a vessel lying moored to his wharf. He also charged wharfage for things placed or landed on the wharf, and storage for goods stored. He had an account also for wood furnished for the steamer. After the steamer had left the wharf, Kidd demanded the goods in question, but the defendant kept them in security for his account. Afterwards, as a witness for defen-



dant swore, and more than six months before the trial, a demand was made on behalf of the plaintiffs, and defendant's witness being in his employ, said they must pay an account due for wharfage and storage, and for wood against the boat before they could have them. For the plaintiffs was proved an indenture, dated the 23rd of May, 1856, whereby plaintiffs chartered the Provincial to Captain Thomas Kidd from that date to the 20th December then next. It was further sworn, that some time after the expiration of the charter party, and on two separate occasions, these goods, which were all belonging to the steamer, and included in the charter party, were demanded on plaintiff's behalf, but defendant refused to deliver them till paid for wood furnished to captain Kidd, when he had the Provincial under the charter party.

The learned judge directed the jury that the only lien the defendant could claim was for wharfage of the goods; that he had no right to detain them for warfage of the vessel, nor for wood furnished to Captain Kidd; and that if the detention had been in reality made for the wood, and the claim for wharfage was merely set up afterwards as a colour for keeping the goods, the jury should have found for the plaintiffs.

The plaintiffs' counsel objected that he should have told the jury that the lien for wharfage of these goods could not be enforced against the plaintiffs, because the demand accrued when Kidd had possession, and the defendant's right, as against the goods, being derived from him, ceased when the charter party expired.

The jury found for the defendant.

In Michaelmas Term, *J. Duggan* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection.

In Hilary Term *W. H. Burns* moved the rule absolute, and *Eccles*, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the court.

Upon the evidence, I am disposed to give the plaintiffs a new trial. I think the weight of evidence was in their favour, and shewed that the withholding the goods was really made to enforce payment of the claim for the wood.

No charge, reducep to a specific sum, was ever advanced, and so far as appears, ever entered or made in defendant's books for wharfage on the goods claimed in this action, and the evidence of a claim on this account is not to my mind at all satisfactory when compared with that relative to the claim for the wood. If the defendant coupled the demand of payment for the wood, with that for payment for wharfage, so as in fact to refuse or to lead the plaintiffs to understand and believe, and meaning they should believe, that he refused to give up the goods in question unless his whole claim was discharged, the plaintiffs ought to have had a verdict. The defendant would still have his remedy for both wood and wharfage against the proper party, but he would have lost, or waived his right to set up the only lien he had in bar of this action. The evidence clearly shews a demand going far beyond what the plea sets up.

If the defendant had claimed a particular sum for wharfage on their goods, and also claimed to hold them for some other general account, not giving him a right of lien, then the plaintiff must have rendered the particular sum before he could maintain an action for the goods ; but such are not the circumstances of this case.

It appears to me that the evidence shewed an assumption on the part of the defendant of a right to detain these goods from the plaintiffs, not merely for wharfage, but also for another claim due, not by plaintiffs, but by a third party, which might be considered a wrongful conversion of the goods, sufficient to have entitled the plaintiffs to recover in trover, and if so, then sufficient to warrant plaintiffs in bringing replevin under our statute.

In our opinion there should be a new trial on payment of costs.

The Chief Justice referred to the following cases:—  
Jones v. Tarleton, 9 M. & W. 675 ; Scarfe v. Morgan, 4 M. & W. 270 ; Duke v. Richards, 4 M. & G. 574.

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## MOSS ET AL. V. REID.

*Common Law Procedure Act, 1856—Arrest—Ca. Sa.*

When a *capias* had been issued, but the defendant not arrested thereon, and after judgment obtained, the plaintiffs *upon the same affidavit* issued a *ca. sa.*, and arrested the defendant.

*Held*, that the proceedings were irregular and should be set aside. The affidavit must relate to the present belief of the party making it, and must therefore be sworn at the time of issuing the writ.

*Hector Cameron* obtained a rule *nisi*, to set aside an order made by the Hon. Mr. Justice *Hagarty*, discharging a summons granted in this cause on the 25th November last, to set aside the writ of *ca. ca.* issued in this cause on the 16th November last, and the arrest and subsequent proceedings thereon. And also that the plaintiffs should shew cause why the said writ of *ca. sa.*, and all proceedings had thereon, should not be set aside with costs, and defendant be discharged from custody, on the grounds that no other or further affidavit was filed than that on which the *capias ad respondendum* was obtained, and that the defendant was never held to special bail, and that said writ of *ca. sa.* was obtained without the proper affidavit being filed, and on grounds disclosed in affidavits.

The facts are, that on the 20th February, 1857, David Moss, one of the plaintiffs, made an affidavit *entitled in this cause* in the usual form for issuing a *capias* against the defendant, swearing that he had good reason to believe and verily did believe the defendant was *immediately* about to leave Upper Canada with intent and design to defraud the plaintiffs of their debt, on which affidavit was endorsed this *prœcipæ*: “A writ of *capias*, *after action*, is required for Moss et al. against Reid on the within for £63 8s. 3d. A *capias* issued on the 26th of Februry, 1857, on this affidavit, the action previously commenced by writ of summons, being then pending, but the writ of *capias* was not placed in the hands of the sheriff for execution. The cause was tried at the assizes at Gode-rich, held on the 11th of March last, and an order for immediate execution was granted. Judgment was entered almost immediately, and a *fi. fa.* against goods was issued

The money not being made, a writ of *ca. sa.* was issued on the 16th of November, on the strength of the affidavit

on which the *capias pendente lite* had been issued. On this the defendant was arrested, and gave a bail bond with two sureties (on the 16th of November, 1857) to the sheriff of Huron and Bruce, conditioned in the form required by statute, and obtained the benefit of the gaol limits.

On the 25th November, 1857, a summons was granted by the Hon. Mr. Justice *Richards*, for the same purpose as the latter alternative of this rule. The delay in applying was accounted for by the fact that on searching in the office of the Deputy Clerk of the Crown at Goderich, it was found that the roll and papers had been sent to the principal office, and that searches had to be made there and the result communicated back before the application could be made. The defendant in his affidavit, swore that since February last he continued to reside in the town of Southampton, where he had resided prior to that time, and that he had not been absent from the province during the said time. The affidavits on shewing cause, did not deny any of the above facts, but they set forth that the defendant had, prior to the making of the affidavit in February, 1857, been arrested in another or other suits for large amounts, and that the defendant had broken the condition of the bond to the sheriff by leaving the gaol limits, and that on the 26th of December, 1857, an assignment was taken of the bail bond, and action brought by the plaintiffs thereon on which issue is joined. That recently the defendant has expressed his willingness to pay a portion of the debt due to the plaintiffs, and to give security for the residue, and it is suggested this application is made without his knowledge.

DRAPER, C. J., delivered the judgment of the court.

The 185th section of the Common Law Procedure Act, 1856, enacts, that "in all cases in which the defendant has been held to special bail," no other affidavit need be made or filed to justify the issuing of a *ca. sa.*, than that on which the writ of *capias* was issued, "but where the defendant has not been held to special bail" a *ca. sa.* may issue after judgment on an affidavit in the same form *mutatis mutandis*, as is required for the issuing of a *capias*, or on an affidavit by the plaintiff, his servant or agent, that he hath reason to



believe that the defendant hath parted with his property or made some secret or fraudulent conveyance thereof to prevent its being taken in execution.

Upon the letter of the statute, the plaintiffs' proceedings are wrong, for the defendant never was held to special bail, and therefore the foundation upon which the right exists to issue a *ca. sa.* without an affidavit after judgment is wanting.

But on the spirit and true reason of the thing, the plaintiffs are equally in the wrong. First—because the affidavit necessary to warrant the issuing of a *capias* must set forth a present existing belief that the defendant is *immediately* about to leave Upper Canada with intent to defraud, wherefore an immediate arrest became necessary. If such an affidavit is made, then to lie by for months without acting on it is an actual disaffirmance of its truth, or at least an admission that if true when made, the plaintiff no longer feels the necessity of arresting his debtor, no longer believes his debtor is about to abscond. In cases where a judge's order is requisite, certainly none would be made upon an affidavit sworn three, four, or as in this case nearly nine months before. The question would be, what is the present belief of the plaintiff, not what he believed months ago, for circumstances may have altered the belief he then entertained. The very fact that the debtor has continued in Upper Canada during all that time affords evidence that he was not *immediately* about to leave Upper Canada, when the affidavit was made. If such an affidavit would not warrant the *capias*, neither will it warrant the *ca. sa.* Second—the affidavit, though true as to the nature of the debt before judgment, is not true as to its nature after judgment, for the judgment has altered the character of the debt. An affidavit sufficient to warrant the issuing of a *capias* would be insufficient to warrant the issuing of a *ca. sa.* after judgment in cases in which the suit had been commenced by writ of summons, and so carried on to judgment. In that event, or in the words of the statute, "where the defendant has not been held to special bail," the affidavit may be in the same form as that required for the issuing a *capias*, *mutatis mu-*

*tandis*, changed in regard to the character of the debt. The affidavit must speak of the existing state of things at the time when the plaintiff *first* issues the process upon which the arrest is to take place. If it be a *capias*, the writ must issue promptly on the making such affidavit, and then; provided the defendant has been held to special bail, the *ca. sa.* goes of course. If the first arrest is after judgment the affidavit must shew the state of things existing *then*, and not at any period antecedent to the recovery of the judgment.

In thus construing the statute according to what we deem its true spirit, we have not overlooked the fact, that according to its letter, a defendant who had not been able to procure bail, and had remained in close custody from the commencement of the suit until the entry of judgment, would not come within the precise meaning of the description of a defendant who has been held to special bail. We do not, however, apprehend that there would be any difficulty in holding that such a case fell within the true meaning of this enactment, and that it would not be necessary to issue a new affidavit in order to warrant the issuing of a *ca. sa.*

I should have thought it unnecessary to have made so many observations on the subject, but for the case of *Beatty v. Taylor*, on which my brother *Hagarty* acted. We cannot acquiesce in that decision or agree to its authority.

In order to obtain a judge's order to arrest a party in England, it is necessary, besides swearing to the debt, to satisfy the judge that there is probable cause for believing the defendant is about to leave England. As to the debt itself, the court considered a year the extent of time during which the affidavit should be considered effectual, "but the statement that the defendant is about to quit England, unless *forthwith* apprehended, must of course be sworn to at or shortly before the time of the application for the order to hold to bail." I think the same principle should apply in our case where the affidavit refers to the debtor being "*immediately*" about to leave Upper Canada. Chitt. Ar. (9th Ed.) 700.

HAGARTY, J.—I fully concur in setting aside the order. It was made by me solely in deference to the Practice Court judgment, and against my own opinion.

Rule absolute.

## HORNE V. MUNRO ET AL.

### *Ejectment—Boundary.*

The question in dispute was, what quantity of land was granted by the patent; the description in which was, "beginning about 12 chains below a small creek which empties itself into the river Thames in lot No. 17; thence W. to the Eastern boundary of lot 16, two chains, more or less; thence N. 45° W. to the N. E. angle of lot 16, 28 chains, more or less; thence S. 45° W. to the river Thames, and thence along the bank of the river against the stream to the place of beginning, being the broken fronts of 16 & 17." The lots were supposed to contain 150 acres. There are two creeks, and the point of commencement contended for by the plaintiff (the upper creek) would give him a much larger quantity of land than the defendant claimed he was entitled to, while that sought to be upheld by the defendant would reduce it to about 50 acres. An old map from the surveyor-general's office was put in evidence, under which the lot had evidently been granted; and a surveyor called for the defence, stated that the point contended for by the plaintiff corresponded best with the old map.

*Held*, that as the description contended for by the plaintiff corresponded best with the oldest plan to be found in the surveyor-general's department, and with a survey since made for the purpose of tracing out or completing parts not fully surveyed before, he was entitled to recover.

*Semble*, per *Draper*, C.J. The Crown may grant a tract of land by a sufficient description to designate the portion meant, although the township within which the land lies has not been surveyed and laid out into lots and concessions, and the grantee will be entitled to hold it although a subsequent survey made by authority of the Crown makes it by name a different lot, or places it in a different concession from that named in the patent, or the surveyor laying it out projects a road through it.

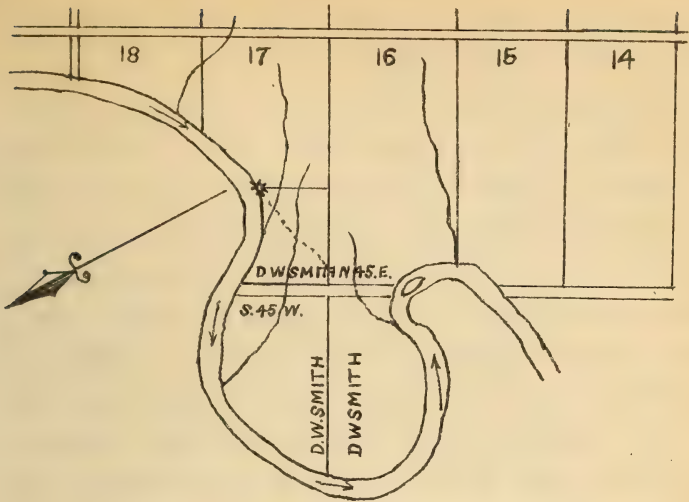
EJECTMENT for lots Nos. 16 & 17, in the front concession on the river Thames in the Township of Dunwich, County of Elgin, commencing where the rear boundary of the aforesaid lot strikes the river Thames at the western extremity of the said boundary nearly opposite to a small island in the river, then 45° E. across a point of land made by the winding of the stream till you come to the river again, and then along the bank of the river with the stream to the place of beginning. Defence for the whole. The plaintiff gave notice that he claimed title under the grant from the Crown to the Honourable David William

Smith, a deed from the said David William Smith to one Abner Miles, and by a deed of bargain and sale from Mrs. Hannah Plater (who claimed the land by a deed of partition, and as devisee of one James Miles, who was heir at law of the said Abner Miles) to the plaintiff.

The trial took place in April last at St. Thomas, before *Richards, J.* The plaintiff put in the patent (by exemplification) bearing date the 10th of February, 1797, in which these lots are stated to contain 150 acres, described thus: "Beginning about 18 chains below a small creek which empties itself into the river Thames in lot No. 17, thence west to the eastern boundary of lot No. 16, two chains, more or less; thence N.  $45^{\circ}$  W. to the N. E. angle of lot No. 16, 28 chains, more or less; thence S.  $45^{\circ}$  W. to the river Thames, and thence along the bank of the river against the stream to the place of beginning, being the broken fronts of 16 and 17."

The next title deed produced was from D. W. Smith to Abner Miles, dated the 4th of September, 1798, for lots No. 16 & 17, front concession on the river La Tranche or Thames, in the township of Dunwich, "commencing where the rear boundary of the aforesaid lots strike the river La Tranche, at the western extremity of the said boundary nearly opposite to a small island in the river; thence N.  $45^{\circ}$  E. across a point of land made by the winding of the stream, &c., precisely as the land is described in the declaration, (Registered the 7th of March, 1805). The plaintiff sufficiently proved a title in himself to an undivided third part of the land. The question really in contest was, what land was covered by the patent. And to establish this the plaintiff put in evidence the oldest map which could be found in the surveyor-general's office, and which, it appeared, was drawn after the river Thames had been sealed, but before any actual survey of the township, laying it out into lots and concessions on the ground.





The plaintiff contended that the place of commencement according to the patent is at the mark \* on the easterly side of No. 17, from which, if the line went west, it would follow the direction of the dotted line. The black line from mark \* is on a course from the river S. 45° W. But the description in the deed of Abner Miles, commences on the river on the west side of No. 16, and running directly across to the river again, and then following the bank of the river all round to the place of beginning, does not reach the place of beginning designated on the patent, and therefore it is of no consequence in the plaintiff's view of the case, as his land does not extend so far. The real question was, which was the creek designated in the patent, there being one which would suit the place marked \* for which plaintiff contends, and there being another creek further down the stream from which the defendant insisted the point of commencement should be found. Afterwards a survey was made and lots were laid out by William Hambly, in 1803, which does not even as to the scaling correspond with the plan projected, upon which the patent to D. W. Smith was framed. Taking the line according to the description in the deed to Abner Miles, the track contains 219 acres, 2 roods, and 21 perches. A subsequent survey was

made for the purpose of completing or tracing out parts not fully surveyed before by D. G. Springer in 1833, which while it corresponds as to the scaling of the river very accurately with the oldest plan, differs most materially as to the concession lines, and laying out of the lots. The patent, according to what defendant contends, would cover only 51 acres, 3 perches. Mr. Springer stated that he found the lots on the old plan nearly the depth of 100 acres from the river further than he found the work on the ground. He stated that between the 4th & 5th concessions he found a gore of about half the width of a concession, which would nearly make up the deficiency he noticed in the front. The upper creek (that contended for by the plaintiff) harmonized best, he said, with the old plan, but the lower creek would best correspond with the quantity of land designated in the patent. Taking the boundaries from the upper creek, and following the description in the patent, the grant covers 284 acres, measuring according to the scale on the old plan, and the part claimed by plaintiff covers  $252\frac{1}{2}$  acres.

A verdict was given for the plaintiff subject to the opinion of the court, who may direct a verdict to be entered for the defendant if of opinion that on the whole evidence the plaintiff is not entitled to recover.

The grants from the Crown since the survey by Hambly have followed his diagram, and the defendant is the purchaser from the Crown of a clergy reserve lot, which, according to Springer's examination of the old survey, and the traces thereof, lies south of the grant to D. W. Smith, assuming that the work on the ground could alter the effect of a grant made previous to such survey.

The verdict was supported by *J. Wilson*, Q.C., and *Becher*, Q.C., argued on behalf of the defendant.

DRAPER, C. J. delivered the judgment of the court.

I have examined the evidence given on the trial of this cause with great care, as the matter is in part left to the decision of the court on a question of fact. In truth there is no question of law raised on which there is any difficulty. That the Crown may grant a tract of land by an apt and

sufficient description to designate the tract meant, although the township within the limits of which it lies has not yet been surveyed and laid out into lots and concessions, is not questioned, and that the identity of the land so granted being clear, the grantee will be entitled to hold it although a subsequent survey made by authority of the Crown, makes it by name a different lot, or places it in a different concession from that mentioned in the patent, or though the surveyor should project a road through it, is, I take it, equally free from doubt. So that the question is reduced to this : What portion of land is contained within the description, when it comes to be applied to the ground ? To ascertain this we must enquire upon what basis the description was framed, and it is not denied, or at least the evidence sufficiently establishes, that it was on the old map, a copy of which is before us. We find also that the map was the project of an actual survey of the township which was to be made, and was on its northerly front bounded by the river Thames, which had been previously scaled with great accuracy, and the courses, &c., laid down carefully on this map. Then, in a bend or reach of the river two lots, 16 & 17, are marked as lying in front of the first concession, and the patent obviously is intended to grant these. It seems there are two creeks running into the Thames, the upper of which being taken as the point of starting, will give a much larger quantity of land than is mentioned in the patent, while the lower creek will give much less. In order to determine which of these two creeks is the one really meant, we have not much evidence. We certainly see how it was interpreted by the grantee, for his conveyance of the 4th of Sept., 1798, (made before the actual survey), is in accordance with what the plaintiff now contends for. At the same time, though the grantee was at that time the surveyor-general of Upper Canada, and may possibly have framed the description in the patent as well as that in the deed to Abner Miles, I should not desire to rest my conclusion on this fact. But when I find Mr. Springer, who made the survey of 1833, and was a witness for the defence, stating that the construction urged by the plaintiff best corresponds with the

old plan on which it was framed before any survey, and when he also states that although the old plan represents the lot as nearly 100 acres deeper than he found the old survey to have marked them, yet, that he also found between the 4th & 5th concessions of that township, a gore or unsurveyed space of about the same depth, which the diagram of the former survey, as I understand, did not shew, I feel convinced that there has been some mistake *subsequent* to the grant to D. W. Smith, which, though I cannot satisfactorily understand, is an additional reason in favour of adhering, for the purpose of this grant, to the old plan, and of construeing the grant in such a manner as if we had nothing before us but that plan and the evidence of the surveyors who have gone on the ground for the purpose of tracing the boundaries by its description. This we should have been obliged to do if the question had arisen before an actual survey had taken place, and if, as I am of opinion, there is sufficient evidence to enable us to determine that the land covered by the patent can be ascertained on the ground, and that the defendants are in possession of some part of it, then without regard to subsequent proceedings, we must uphold the plaintiff's claim to recover.

Judgment for plaintiff.

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GRANT, ADMINISTRATRIX, &C., v. THE GREAT WESTERN RAILWAY COMPANY.

*Administration—Personalty.*

The law of England as to granting probate or committing letters of administration is the law to be administred by our probate and surrogate courts.

Where a party domiciled in the state of New York died suddenly *in itinere* in the County of Wentworth in this province, having trifling personal effects about of a less value than £5.

*Held*, that the surrogate court of Wentworth had jurisdiction to grant administration of its effects. Such administration should be granted by the surrogate court only to an inhabitant of the province.

This was an action founded on the provincial statute 10 & 11 Vic., ch. 6,—“An act for compensating the families of persons killed by accident and, for other purposes therein mentioned.”—brought to recover damages arising from the death of the intestate, Alexander Grant, who was killed by



the accident which happened on the defendants' railway near Hamilton, on the 12th of March, 1857; charging the death to have arisen from defendants' negligence. The plaintiff made profert of the letters of administration, dated the 8th of June, 1857, granted to her by the Surrogate Court of the county of Wentworth, in which county the intestate was killed. The defendants pleaded that the intestate was at the time of his death commorant and domiciled in the State of New York, one of the United States of America, out of the jurisdiction of the Surrogate Court of the county of Wentworth, and that at the time of his death he had not any personal estate, rights or credits, which were *bona notabilia* within the jurisdiction of the Surrogate Court of the county of Wentworth, out of which the alleged letters of administration were issued. The replication admitted that the intestate was usually domiciled in the State of New York, &c., but averred that he died at Hamilton, in the county of Wentworth, and at the time of his death he had personal estate and effects in the said county (which were *bona notabilia*) within the jurisdiction, &c.

The cause was tried in November last at Hamilton, before Hagarty, J. The jury assessed the damages at £2,800, divided as follows, £1,500 to the widow (the plaintiff), £100 to the oldest child, £150 to the second child, £250 to the third child, £300 to the fourth child, £500 to the fifth child.

The letters of administration were put in drawn up precisely in the form used in the ecclesiastical court in England, even to the using the pronoun of the first person, as designating the judge of the Surrogate Court, in the plural number ("we," "us") as is done by the bishops and archbishops. The evidence as to *bona notabilia* was, that on the body of deceased there was the usual clothing (except a coat) and that two dollars and some few shillings in silver was found in his pocket and handed by the coroner to the defendants for safe keeping.

It was proved that the deceased, who was a Scotchman by birth, had, since 1838, lived in the United States, and for some years on Goat Island, close to the Niagara Falls, where he kept a garden, and a shop selling Indian curiosities, &c.

His family consisted of a wife, (the plaintiff,) and five children, the oldest sixteen, the youngest three years of age. That he had personal property there valued at \$2,709, and real estate fairly worth \$33,000. That the debts due by him secured by mortgage on his real estate amounted to \$11,000, and his other debts to \$3,600. His net annual receipts were estimated at \$3,000, and upwards, exclusive of the rental from his real property, and his personal habits were very saving.

At the close of plaintiff's case *Dr. Connor*, for defendants, objected that the case failed on the issue, as to personality in the County of Wentworth. As plaintiffs would not consent that leave should be reserved to move for a nonsuit on this ground, the judge allowed the case to proceed subject to the objection, as there was some evidence, though slight, of personality, and as the statute 33 Geo. III. ch. 8, sec. 2, in giving jurisdiction to the Surrogate Courts, prescribed no amount of property, but merely used the words, "having personal estate within the limits of each district respectively."

In Michaelmas Term *Connor*, Q. C., obtained a rule *nisi* for a new trial, on the ground of excessive damages, and of misdirection, the learned judge having ruled that there was evidence of *bona notabilia* belonging to the deceased in the County of Wentworth entitling the plaintiff to administer.

*Start* shewed cause. On the question of damages he referred to *Blake v. Midland Railway Company*, 18 Q. B., 93 and to *Mayne on damages*, 347-8; and on the question of *bona notabilia*, he argued that the Statute of Upper Canada of 33 Geo. III., gave the Surrogate Court jurisdiction.

*Connor*, in reply, urged there could be no administration granted in this province except to the estate of a person who had lived therein. That the courts created by the 33 Geo. III., ch. 8, sec. 1, were divided into surrogate, which were district courts, and the court of probate, which was general over Upper Canada. That the former applied to persons *inhabiting* the province, the latter to *all* who *died* within it. He cited *White v. Hunter*, 1 U. C., Q. B., 452; *Beard v. Ketchum*, 5 U. C. Q. B. 114; *Stokes v. Bate*, 5 B. & C. 491; *Com. dig. Admn. D. 4.*; 1 *Williams Exors.* 222, 235, 166.

DRAPER, C. J., delivered the judgment of the court.

In determining the questions raised as to the administration, and the construction to be put upon the statute of Upper Canada, 33 Geo. III., ch. 8, it must be borne in mind that the first act of the legislature of that province, 32 Geo. III., ch. 1, sec. 3, declares "that from and after the passing of this act in all matters of controversy relative to property and civil rights resort shall be had to the laws of England, as the rule for the decision of the same, and sec. 5 introduces the rules of evidence established in England, into the several courts of law and equity, while sec. 6 contains a proviso that nothing in the act contained shall be construed "to introduce the laws of England respecting the maintenance of the poor or respecting bankrupts."

The 33rd Geo. III., ch. 8, is entitled, "An Act to establish a court of probate in this province, and also a surrogate court in every district thereof." The preamble to the first section is as follows: "Whereas, it is expedient to establish a court for the purpose of granting probate of wills, and committing letters of administration of the goods of persons dying intestate, having personal estate within the province." And then there is constituted a court with full power to issue process and hold cognizance of all matters relative to the granting of probates and committing of letters of administration, and to grant probate of wills, and commit letters of administration of the goods of persons dying intestate, having personal estate, rights and credits within the province, to be called the Court of Probate of the Province of Upper Canada, over which the Governor of that province is to preside, and to hear, give order or decree, or pronounce judgment in all questions, causes or suits that may be brought before him relative to the matters aforesaid, and he is authorised to nominate and appoint an official principal together with a register and such officers as may be necessary for the exercise of the jurisdiction to the said court belonging. The second section begins with reciting that it "will be convenient for the inhabitants of this province to be enabled to obtain probate of wills and letters of administration within their several districts." And it empowers the Gover-



nor to institute by commission under the great seal of the province in every district (now every county or union of counties) a court for the purpose of granting probate of wills and letters of administration of the goods of persons dying intestate, having personal estate within the limits of each district respectively, which courts shall be severally known by the name of the surrogate court of, &c., and also to appoint a surrogate to act as judge in each court, and a register and such officers as may be necessary, and that each of the said courts shall have power to issue process, and hold cognizance of all matters relative to the granting probate, and committing letters of administration (as in sec. 1) within the limits of their respective districts, except in the cases hereinafter mentioned. The exception is (sec. 3) that where a testator or intestate shall die possessed of goods, chattels or credits to the amount of £5, in any district other than that *in which he usually resided at the time of his decease*, or shall die possessed of goods to the value of £5, in two or more several districts within this province, the probate, or letters of administration, shall be granted by the court of probate only. By sec. 6, "every will or testamentary paper which shall be duly proved, approved, and insinuated" in the court of probate or any surrogate court shall be kept among the records thereof, and a transcript thereof authenticated under the seal of such court shall be received as the regular probate of such will, &c., so far as regards the disposal of personal estate and effects in all courts in the province, or, wherever it may be necessary to produce the same. The 7th, 8th, and 9th secs. are nearly literal transcripts of the 19th, 20th, and 21st secs. of the statute of frauds relative to uncupative wills. The 10th section requires proof of the death of a party, and of his intestacy, to be made before letters of administration are granted. The 11th directs a citation to be issued, and provides for its service or public notification, when any person not being the next of kin, not mentioning the widow as in the 9th, of a party dying intestate applies for letters of administration to his estate, with a proviso, that if the next of kin usually residing in the province and regularly entitled



to administer it, shall be absent from the province, it shall be lawful for the judge of probate or surrogate *within the limits of his district* to grant a temporary administration to the next of kin, who shall be in the province, of the intestate. The 12th section provides for the taking of bonds with sureties from persons obtaining letters of administration, and is similar to the 2nd sec. of the statute of distributions (22 & 23 Car. 2, ch. 10). The condition of the bond providing, among other things, that the administrator shall deliver and pay the remainder of the intestates' effects, after satisfying debts and expenses, to such person as the judge of the court, conformably to the statute of distributions, and the amending act of 1 Jac. 2, c. 17, shall appoint. The 13th section, giving authority to the judges to cite administrators to account and to make distribution, is taken from the 3rd and 8th sections of the statute of distributions. The 14th section gives power to the courts to enforce obedience to their process, order, and sentences, by writ of attachment, and by sequestration of goods. The 15th makes some provision in relation to granting administration with the will annexed. The 16th gives an appeal from the surrogate courts to the court of probate. The 17th fixes the time of sitting of the courts, and the 18th and last establishes the fees to be taken for services in the courts.

It is obvious that this act is framed on the assumption of the existence of a body of law which the machinery created by the act can put into active execution. The law as to making wills of personality, the rights and duties of executors, of legatees of the next of kin of parties obtaining administration of the personal estate of persons who shall die intestate, is all taken by the language used in the act to exist. This act gives the power of administering that law to the courts which it creates. It moreover authorises the appointment of an official principal, without any definition of his power, or authority, or duties, leaving all these to be gathered from his name, and from the fact that he is to be appointed by the judge of the court of probate. Without reference to the ecclesiastical courts in England, and to

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their jurisdiction in reference to wills and intestate's estates. there is no meaning to be attached to this name. The act uses in respect to wills the terms "proved, approved, and insinuated," (vide Plowd. 580). The two latter of which have their appropriate meaning in the ecclesiastical courts of England. It assumes these courts may issue process, make orders, pronounce sentence and decrees on matters within their cognizance, without either declaring what their practice or forms or proceedings are to be, and without, in express words, giving these courts authority to make rules to regulate their practice. It speaks of issuing a citation, the name adopted in the spiritual courts for a summons to appear, and of an apparitor, who is the messenger to cite or arrest offenders, and to execute the decrees of these courts in England. Terms are created for hearing and determining all motions, petitions, pleadings, suits and causes, though no provision is made as to the form or nature of the pleadings, and the table of fees includes fees on a *caveat*, a writ known only in Chancery to prevent the enrolment of a decree, or in the spiritual court to prevent the granting probate of a will, or letters of administration to the estate of an intestate. There is one departure from the usual proceedings of the ecclesiastical courts in England, to enforce appearance, which is obviously meant to suit the circumstances of the province by authorising them to issue writs of attachment and of sequestration for that purpose, and for enforcing the decree, instead of by the writ *de excommunicato capiendo* which then issued out of Chancery in England.

It does not appear very clear to me why the 7th, 8th, and 9th sections of this act were considered necessary, for they are almost exact transcripts of the 19th, 20th, and 21st sections of the statute of frauds, which certainly was introduced into Upper Canada by the general adoption of the laws of England as the rule of decision. Perhaps it was thought safer to re-enact those provisions as containing regulations upon matters of practice, as well as others of a more general character.

By virtue of his commission and instructions, the Governor was before the passing of this act ordinary of the province,

and had power committed to him to grant probate of wills and administration of the effects of parties dying intestate.

I have arrived at the conclusion, upon a full consideration of this act, that the legislature of Upper Canada intended that the law of England relative to the grant of probate, and the committing of letters of administration, should be the law administered in the courts created by the act of 1793, with the same process, pleadings, and practice, unless where our statutes express to the contrary, as were in use in the ecclesiastical courts in England in relation to probates and letters of administration. In this view the third section of the act might at first sight appear unnecessary, but it will be seen that it relates to the jurisdiction of the new courts, at least as much as to the law which they are to dispense, and, if to some extent involving the latter, it more plainly relates to the former, and its introduction, if not indispensable for the purpose of conferring or limiting jurisdiction, (which it appears to have been,) may be viewed in the same light as that of the enactments in regard to nuncupatory wills, rather than as affording ground for the application of the rule *expressum facit cessare tacitum*.

And of this law (thus introduced and intended to be administered) the courts of common law take notice. In the language of *Lord Campbell*, "There is no doubt the judges of a common law court take judicial notice not only of the doctrines of equity, but of those of every branch of English law when they incidentally come before them," (*Sims v. Marryatt*, 17 Q. B.. 292). Where a question of ecclesiastical law arose it used to be the practice to move for two doctors, but they came as advocates to argue the law, not as witnesses to state it.

The first enquiry therefore would seem to be, to which of the ecclesiastical courts in England the jurisdiction would belong under similar circumstances, to the prerogative or the consistory court?

The origin of the jurisdiction of the ordinary in reference to intestate estates is concisely stated in the judgment of *Weston, J.*, in *Graysbrook v. Fox*, (Plowd. 277, and seq. *Selden Juris. of Test.* lib. 2, c. 1-2.) The jurisdiction

belonged to the spiritual courts, and was limited, directed and controlled by various acts of parliament, (Westm. 2nd, 13 Edw. I., ch. 19; 31 Edw. III., stat. 2, ch. 11; 21 Hen. VIII., ch. 5, and others). Their practice was mainly derived from the civil law, but the canon or ecclesiastical law, with statutory modifications and recognition (Godol. Ab. 96, 2 Burn's Eccl. law, 33, see contra 9 Co. 38.)

The 7th sec. of 25 H. VIII., ch. 19, provided "that such canons, constitutions, ordinances, and synodols provincial being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, shall now still be used and executed as they were afore the making of this act, till such time as they may be viewed, searched, or otherwise ordered and determined by the said two-and-thirty persons," (commissioners to be appointed under that act), "or the more part of them."

In *Caudrey's case*, 5 Co. 1, 33, *Lord Coke* quotes almost the very words of this statute in reply to the supposed question, what canons, constitutions, &c., are in force, and treats such as are there set forth as the king's ecclesiastical law of the realm.

*Lord Hale*, on the same subject observes, "All the strength that either the papal or imperial laws have obtained in this kingdom, is only because they have been received or admitted either by the consent of parliament, and so are part of the statute laws, or else by immemorial usage in some particular cases and courts, and not otherwise, and therefore so far as such laws are received and allowed of here, so far they obtain and no farther, and the authority and force they have here is not founded on or derived from themselves, for so they bind no more with us than our laws bind in Rome and Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence and qualifies their obligation."

*Lord Hardwicke*, in *Middleton v. Croft*, (Str. 1060, 2 Atk., 659), takes the same view, and treats the statute 25 Hen. VIII., ch. 19, and 35 Hen. VIII., ch. 18, as the foundations on which the ecclesiastical law rests for its binding the laity.



It is said that by the general canon law, the metropolitan had original jurisdiction throughout his province, (*Scarth v. Bishop of London*, 1 Hagg, 635), and that though since restrained by the 93rd canon of 1603, he has still the right of visiting his bishops, and of inhibiting them during his visitations in the same manner as bishops visit and inhibit their respective archdeacons, and a general concurrency of jurisdiction may have been reserved by composition or otherwise.

The jurisdiction of the consistory court appears to rest on the locality of the goods, for I gather the general rule to be that all ecclesiastical jurisdictions are limited in their authority to property locally situate within their district. (See *Crossly v. The Archdeacon of Sudbury*, 3 Hagg. 197; 1 Roll. Abr. 901). Though at one time the fact of a man's dying in a diocese where he had no goods, though he had goods elsewhere, is said to give jurisdiction to the ordinary where he died. But the consistorial court could not grant administration over goods not within the limits of its own jurisdiction. While the prerogative court, embracing many dioceses, had jurisdiction in each of them, this gave rise to disputes as to jurisdiction, and as *Sir John Nicholl* suggests, caused a sort of scramble between the officers of the prerogative and diocesan courts to get hold of the effects of a party dying intestate. To remedy this, the doctrine of *bona notabilia* was established.

"The question of *bonum notabile*," says *Bayley*, B., in *Ewing* 1 Cr. & J., 157; 2 Bl. Com. 508, 509, "is essential only to ascertain the *situs* of the property, and to ascertain with regard to the probate, out of what limits the power that is to clothe the executor with the means of acting upon it shall issue, and it is *bonum notabile* in one place or another according to its *situs*."

The earliest mention that I have found that any particular value of the goods was deemed requisite, or had any influence on the granting of probate, is a constitution made in the beginning of the reign of Edw. III., whereby it was ordained that for the insinuation of the will of a poor

man, the inventory of whose goods did not exceed one hundred shillings sterling, nothing should be demanded. *Lynwood* pronounces *bona notabilia* to be such whose possession would exempt the owner from the description of pauper, from whence he draws the conclusion that one having less than one hundred shillings sterling, had not *bona notabilia*. (Provinciale, 174, cited 4 Reeve's Hist. of the Com. Law, 77.)

The 92 and 93rd canons of 1603, are those usually cited as fixing the sum of £5 as the value of goods which, owned by the deceased in two or more dioceses, were to be accounted *bona notabilia*, and so to found the jurisdiction of the prerogative court. (Str. 1057; 2 Atkyns 659.) *Lord Hardwick*, however, in his very learned judgment already referred to, says, that there were canons which set it at that sum long before even *Perkins*, who (sec. 489), notwithstanding, estimates them at forty shillings, and therefore, as he observes, the 92rd canon did not attempt to alter the law, and even if it did, it was a matter that did not concern the laity, but was merely a regulation affecting the ecclesiastical courts, regulating the distribution of the fees of administration between the metropolitain and his diocesans, and their officers. In another part of the same judgment in general reference to these canons, he remarks, that "they did not *proprio vigore* bind the laity, not having been confirmed by parliament, though some of them are only declaratory of the ancient canon law."

In the tract on the use of the law, *Lord Bacon* treats the amount as unsettled. He writes thus, "It groweth often in question what bishop shall have the right of proving wills and granting administration of goods. In which controversy the rule is thus, that if the party dead, had, at the time of his death, *bona notabilia* in divers dioceses, of *some reasonable value*, then the archbishop of the province where he died is to have the probate of his will, or to grant the administration of his goods as the case falleth out, otherwise *the bishop of the diocese where he died* is to do it." This was written before 1603.

The 92nd canon inhibits the granting probate or admin-

istration by the bishop, when the party deceased has goods in any diocese other than that in which he died, to the value of £5, with a proviso that if any man die *in itinere*, the goods that he hath about him at that present shall not cause his testament or administration to be liable unto the prerogative court. The 93rd canon, in like manner, restrains the prerogative court, unless the party deceased was, at the time of his death, possessed of goods and chattels in some other diocese than that in which he died, amounting to the value of £5 at the least.

The binding effect of these canons on the granting of administration by the spiritual court has been recognised by numerous decisions of the common law courts in England.

In *Hilliard v. Cox* (Salk. 37), in debt by an administrator on administration granted by the Bishop of London, the defendant pleaded in bar that the intestate *tempore mortis* was resident in another diocese, and it was held good on demurrer. The court said that simple contract debts are personal, and administration must be committed of them *where the party dies*. (Vide *Somerville v. Somerville*, 5 Ves. 750.) And if a man have two houses, and lives most at one, but sometimes goes to the other, and being there for a day or two, dies, administration of his personal estate shall be granted by the bishop of the diocese where he dies, for he was commorant there, and not there as a traveller. In *Griffith v. Griffith*, *Lee*, C. J., (Sayer 83) takes notice of a mistake in the foregoing report, for he observes it is there said that a plea that the intestate died on the high seas, out of the jurisdiction of the Bishop of B——, was holden good, while it appears from the report in 2 Salk. 750, that the plea was that the debtor to the intestate was, at the time of the intestate's death, resident in another diocese. And the court held in the latter case, that the right of granting administration is founded, *not on the dying of an intestate within a diocese*, but upon the leaving goods therein. Though this opinion seems at variance with 1 Rolle's Abr. (page 909, l. 29), where it is said if a man, not being *in itinere*, die in one diocese, not having any goods there, but having *bona notabilia* in another diocese, this shall be sufficient

*bona notabilia* for the archbishop to grant probate, because the ordinary where he dieth is to take as great care of the testator and his goods as the other ordinary where his goods are.

In Doe dem. Allen v. Ovans (2 B. & Ad. 423), the testator, whose residence and property were in the diocese of Gloucester, went on temporary business to Bristol, and in the way met with an accident, in consequence of which he was taken to the Bristol infirmary and died, within the diocese of Bristol, a few days after. Probate of his will was granted by the Bishop of Gloucester, and the court held it was regular. The passage above cited from Rolle was urged on behalf of the defendant, but Lord Tenterden distinguished the case on the ground that the testator died while he was *in itinere*, and said, "The 92nd canon, Jac. 1, provides that when a man dies on a journey, his goods which are with him at the time of his death are not *bona notabilia*, and we think the case falls within the principle of the canon, which appears to be this, that the goods of the party who so dies are supposed to be for the purpose of administration of the ordinary in the place where he is domiciled, notwithstanding his personal absence."

These authorities, among other points, sufficiently establish that the law as administered in the ecclesiastical courts, including the canons of 1603 (although they did not, as Lord Hardwicke observes, *proprio vigore* bind the laity), is recognised in the temporal courts in England, as furnishing the rule of decision, when questions as to the sufficiency or validity of probate or letters of administration arise in England. It would be extremely easy to cite a long roll of other cases to the same effect.

But it is necessary clearly to understand the true object and effect of the doctrine of *bona notabilia*, and it appears to me that the whole scope of the canons in question was to prevent conflict of jurisdiction, and to determine out of which of the spiritual courts administration of the effects of deceased parties should be granted. They did not regulate or profess to regulate the *rights* of the laity to obtain probate or letters of administration, but only the right of the



particular tribunal to give it, and though £5 is fixed as the value of goods necessary to constitute them *bona notabilia*, and so to determine the jurisdiction, neither that nor any other sum is fixed as a necessary value of the effects of the deceased, before the jurisdiction of some one of the spiritual courts could attach. The constitution in the reign of Edward III., already referred to, shews that there might be administration sought of the effects of one who may, from the little value of his effects, be considered a pauper. There may also be many purposes for which an administration is necessary, though the estate of the deceased has no beneficial interest in the effects to be administered. A large sum of money, for instance, might be invested in the public funds in the name of the deceased, and administration be necessary for the benefit of *cestui que* trusts, in which case it would seem the property, as regards the estate and interest of the deceased, might be truly sworn to be under £5, for the purpose, at least, of obtaining letters of administration to the particular fund, or perhaps even general letters of administration. See in the goods of Wells in the prerogative court (15 Jur. 160).

It is said in Rolle Abr. (1 Rolle Ab. 908), if the testator dies beyond seas, although the goods are in one diocese only, the archbishop is to give probate. That, however, is denied in Cecil v. Darkin (1 Freem. 256); and Sir John Nicholl, in Scarth v. Bishop of London (1 Hagg.), says the authorities for this position are extremely loose and vague, and he said the practice in such cases was to grant probate in either jurisdiction, that the jurisdiction was concurrent, though the prerogative court would, in aid of justice, grant an additional probate if required. And in a late case (in the goods of Vincenzo Frederici, 17 Jur. 1130), under similar circumstances, probate was granted by the consistory court. The rule in the courts of equity in England, appears to be to require prerogative probates and letters of administration for the payment of money out of court; but that rule has, under particular circumstances, been departed from (in re Knowles, 15 Jur. 1163), and diocesan administration held sufficient. And the reasons on which this practice has ob-

tained do not appear applicable to the circumstances of the present case. Many of the cases bearing on the question of jurisdiction are referred to in *White v. Rose* (3 Q. B. 493), though that decision does not touch this case. In the *Attorney General v. Dimond* (1 Cr. & J. 369), Lord Lyndhurst thus states the law : “ The jurisdiction to grant probate is regulated by the place of the testator’s death and the local situation of his effects at the time of his death. The probate is granted in respect of the effects which are within the jurisdiction of the spiritual judge at the death of the testator. The jurisdiction is exercised in respect of these effects only.”

In *Hare v. Nasmyth* (2 Addams, 25 U.), the property was in England, and the party died there, but the domicile was in Scotland. Prerogative probate was granted. No question arose as to jurisdiction, nor indeed do I think that any case can be found which will shew that the prerogative court has no jurisdiction to grant probate under such circumstances, even though the deceased may have left property in only one diocese in England. But in this latter event, I can see no solid ground for a distinction between this case and that of *Searth v. The Bishop of London*, and I therefore conclude the diocesan court might have granted probate, &c., and that the prerogative and diocesan courts possess concurrent jurisdiction. I do not think the fact of a man’s dying in *itinere* has any operation on the question of jurisdiction, except as between the ecclesiastical courts themselves. The reason on which that doctrine rest cease to have any application when a party has no goods in any place within the jurisdiction of the prerogative court, other than in the diocese wherein he died.

It remains then to enquire whether our statute makes any difference—whether in fact the surrogate courts here have the same jurisdiction as the consistory courts in England.

I have already set out the second section of 33 Geo. III., c. 8. The recital refers to the relief or convenience of *inhabitants* of the province in their several districts (now counties). For that convenience a court is authorised to be erected (the statute does not itself erect it, as it does the

court of probate), to grant probate of wills, or administration “of the goods of persons dying intestate—having personal estate within the limits of each district respectively.” And it gives authority to each court to grant probate of wills or “administration of all and singular the goods and effects, rights and credits of persons dying intestate within the limits of their respective districts,” except in cases provided for by the next section. Reading the whole of the second section together—I think the last part of it should be read, as if the words “*of persons dying intestate*” were within a parenthesis—and that the sense is, that the surrogate courts are to grant administration of goods, &c., which are within the limits of their respective districts, of persons dying intestate. I look upon the third clause as operating upon the jurisdiction of our court of probate and surrogate courts in the same manner as the 92nd canon operates on the jurisdiction of the prerogative and diocesan courts, and that the sum of £5 is not a value of goods of a deceased party without which no jurisdiction attaches—but a value fixed, in order to determine to which of our courts the jurisdiction shall belong. Whether the court of probate may not have jurisdiction in all cases, is certainly not so clear, as that, where there are *bona notabilia* within two districts—or where the deceased dies possessed of goods, &c., of the value of £5 in any *district* other than that of his usual residence, the surrogate court has no jurisdiction. There is nothing in the third section, like the 93rd canon, restrictive of the superior jurisdiction. But at all events I think the generality of the jurisdiction conferred on the probate court over the granting probate of wills, and committing administration of “the goods of persons dying intestate, having personal estate, &c., within this province,” extends to giving them a concurrent jurisdiction in the same cases as the prerogative courts in England possess it. The recital to this second section must, I think, be taken—to use the word “*inhabitants*,” in reference to the parties to whom administration is to be granted, and not to the deceased persons whose effects are to be administered.

I am of opinion, therefore, that on the true construction

of the statute, the surrogate court has jurisdiction to grant administration of the goods of a party dying intestate, though less than £5 in value, provided such party had no goods, bringing the case within the operation of the third section—but that such administration can only be lawfully granted to an inhabitant of the province. I cannot say I have arrived at the latter conclusion without great hesitation, but it appears to me that this is one of the lines of demarcation furnished by the act, to separate the jurisdiction of the surrogate courts and the court of probate.

But the defence is rested on two facts: 1st that the deceased was commorant and domiciled at the time of his death in a foreign country, and 2nd, that at the time of his death he had not any personal estate which was *bonum notabile* within the jurisdiction of the surrogate court of Wentworth. The replication admits the first, and takes issue on the second of these allegations. No other question is raised; and therefore the fact, plainly deducible from the evidence, that the plaintiff is not an inhabitant of Upper Canada, nor was such inhabitant when the letters of administration was granted to her, is not relied on.

For reasons already set forth, I think the fact that the deceased was a resident in a foreign country constitute no valid objection to the surrogate administration. And as to the allegation that the deceased had no effects which were *bona notabilia* in the county of Wentworth, I suppose it is meant that the deceased had not effects in that county to the value of £5. If this be the defence relied on, then, as I have already said, I think the statute does not make the leaving goods of that value by the deceased within the county of Wentworth a condition to the jurisdiction of the surrogate court attaching. The value of £5 (which is meant by saying that the goods constituted *bona notabilia*) is only referred to in the statute, as one of the circumstances by which the jurisdiction of the surrogate court is taken away. It is no where set forth as a circumstance necessary to confer the jurisdiction.

It follows, therefore, in my opinion, that though it appeared that the deceased left no *bona notabilia*—that is, no



goods in the county of Wentworth of the value of £5, still, as he left goods in that county, there was something to be administered—something on which the jurisdiction to grant letters of administration would attach, and I do not think the simple fact that he had a foreign domicile is sufficient to oust the jurisdiction of the surrogate court to grant administration of those goods.

I do not give any opinion whether, if there had been nothing to require administration but the accruing of this cause of action (as might have been the case, if he had survived the accident long enough to be carried home, and then died from its effects), an administration for the particular purpose could have been granted. If it could, I think it will be found that the court of probate alone had jurisdiction.

The only remaining question is, whether a new trial should be granted for excessive damages. On the best consideration I can give, I find no sufficient reason for interfering on this ground with the verdict.

In my opinion, therefore, the rule must be discharged.

Cases referred to by the Chief Justice:—21 Hen. VIII., ch. 5; 38 Geo. III., ch. 87; *Ex parte Sergeson*, 4 Ves. 847. The jurisdiction to grant probate was not apparently originally an ecclesiastical jurisdiction. *Sec Bac. Abr. Ex. & Ad. E.*; *Allen v. Dundas*, 3 T. R. 125; *Palmer v. Allicock*, 2 Show. 374; *Rex v. Vincent*, 1 Str. 481; *Rex x. Goodrich*, cited in 3 T. R. 126; *Rex v. Rhodes*, 2 Str. 703; 2 Inst. 397, 652, 658; *Graysbrook v. Fox*, Plowd. 277; Stat. West. 2; 13 Edw. I., cap. 19; 8 Co. 268, Sir Jno. Nedham's case; 5 Co. 29, Prince's case; *Hobson v. Wells*, Alleyn, 53; *Hillyard v. Cox*, Salk. 37; Stat. of Frauds, 29 Car. II., ch. 3, sec. 24; 23 Hen. VIII., ch. 9; Lev. 78; *Price v. Simpson*, Cro. El., 718; Dyer 305, *Daniel v. Luker*, and notes; 4 Inst. 335; *Byron v. Byron*, Cro. El. 472; *Logan v. Fairlie*, 2 S. & S., 284; *Atty. Gen. v. Dimond*, 1 C. & J. 356; *Somerville v. Somerville*, 5 Ves. 750; *Bruce v. Bruce*, 2 B. & P. 229 *n*; 2 Bl. Com. 503—9; *Middleton v. Croft*, Str. 1056, 8 Co. 268; *Middleton v. Croft*, 2 Atk. 650; *Jauncey v. Sealy*, 1 Vern. 397; 4 Bacon's Works, p. 129; *Stokes v. Bate*, 5 B. & C. 491; *Hensloe's case*, 9 Co.

39; 1 P. Wm. 43, 44, Blackboro' v. Davis; 1 Str. 73, Rex v. Loggen; Bull, N. P., 141*a*, Ravenscroft v. Ravenscroft, 1 Lev. 305. If a man die intestate out of the kingdom, the Archbishop shall grant administration—1 Roll. 908, 1. 29; See also l. 40, that if a man have *bona notabilia* in Ireland and England, the archbishops of Dublin and Canterbury shall respectively grant administration—Shaw v. Stoughton, 2 Lev. 86; Dal. 77. *Bona notabilia* was originally of no certain value, 40s. or less, 1 Roll. 909, l. 40, 45, 8 Co. 268; See 1 Lord Raym. 562; Whyte v. Rose, 4 Jur. 986; Whyte v. Rose. 3 Q. B. 493; Huthwate v. Phaire, 1 M. & G. 159; Larpent v. Lindry, 1 Hag. Ecc. Repp. 382; Scarth v. Bishop of London, *Ib.* 625; Spratt v. Harris, 4 Hag. 405; Price v. Dewhurst, 4 Myl. & Cr. 76; Stokes v. Bates, 5 B. & C. 491; 2 Atk. 63: Ambl. 416; Bond v. Graham, 1 Hare, 482, 6 Jur. 620; Jones v. Howells, 2 Hare, 342; In re. Knowles, 15 Jur., 1163; DeGex. W. & G.; Metcalf v. Metcalf, 1 Keen, 74; Beadles v. Burel, 10 Sim. 332; Young v. Elworthy, 1 M. & K. 215; Atty.Gen. v. Bouwens, 4 M. & W. 193; Larpent v. Lindry, 1 Hag, 382; In re. goods of Wells. 15 Jur. 160; Preston v. Lord Melville, 8 Cl. & Fin. 1; England v. Blackwall, 30 L. T. 148; Altenburg v. Thompson, 30 L. T., 154; Spratt v. Harris, 4 Hag. 405; Curling v. Thornton, 2 Addams 6.

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#### CARLISLE V. ORDE.

##### *Covenants (absolute)—Title.*

*Held*, that a party giving an absolute covenant in a conveyance of real estate, and a bond conditioned that it should be void upon payment of a certain mortgage for £75 upon the land conveyed, is liable thereon, although no legal proceedings may have been taken upon the mortgage by which the party is damnified.

First count of the declaration is in covenant on an indenture made between parties by which defendant granted the land in the deed mentioned to plaintiff, and covenanted that he was solely and rightfully seised of a perfect, absolute and indefeasable estate in fee simple in the lands, without any matter or thing to charge, change, encumber or defeat the same, alleging for breach that at the time of making the covenant the property was charged and encumbered with a

mortgage made by defendant to one Frederick Ferguson in violation of defendant's covenant, which mortgage was at the commencement of the suit, and still is, unsatisfied, and an incumbrance on the land.

Second count, that in said indenture he covenanted for quiet enjoyment free from all incumbrances by way of taxes or otherwise whatsoever, assigns as a breach there were taxes due on portions of the land, in violation of the covenant, and that plaintiff was obliged to pay and did pay the arrears of taxes, amounting to £5, which remains unpaid by defendant.

Third count on a bond from defendant to plaintiff in the penal sum of £110, conditioned for the payment by defendant of £75 on or about 1st February, 1857, in discharge of a mortgage on certain lands bought from defendant by plaintiff, and therein referred to: that defendant has not paid the money, whereby the mortgage remains undischarged, and the plaintiff claims       hundered pounds. Judgment by *nil dicit*, then a suggestion that it was not known what damages plaintiff had sustained: award of jury process in the form formerly adopted.

The cause was taken down to trial before *Richards, J.*, at the last Peterboro' assizes. It was shewn that the taxes and expenses due on lot No. 6, south of Antrim Street and west of George Street, amounted to £2 0s. 6d. after the writs to sell the land had been placed in the sheriff's hands and that plaintiff paid these sums on 29th of July, 1857.

The execution of a mortgage from defendant to Frederick Ferguson, which was put in, was proven it was to secure the payment of £75, with interest, from 1st February, 1852, The assignee of the mortgage proved no part of the money secured by it had been paid. The bond from defendant to plaintiff contained a recital that plaintiff had purchased from him town lot No. 6, south of Antrim street, for £50, and there was a mortgage on it as well as lots 4, 5 & 7, for £75, and the condition of the bond was, that it should be void if he paid off the said sum of £75, on or about the 1st of February then next; bond dated 1st of December, 1853. On this evidence plaintiff claimed to recover the amount of the mortgage and interest, amounting to £96 7s. 6d., and

£2 0s. 6d., the amount paid for the taxes and expenses. The learned judge doubted if he could recover this amount without first paying off the mortgage, particularly as he had not been disturbed in the possession of his lot and might never be. He directed damages to be assessed on the breach for the non-payment of taxes to £2 0s. 6d., and on the breach assigned on the bond for non-payment of the mortgage to 1st. with leave to plaintiff to move to increase the damages on that breach to £96 7s. 6d., if the court should be of opinion under the facts shewn he was entitled to recover that amount on that breach.

In Michaelmas Term last *A. Crooks* moved to increase the verdict pursuant to leave reserved.

The rule was enlarged by the plaintiff until Hilary Term, when it was moved absolute. It was served on defendant, who did not appear to the action on the 23rd November last by leaving a copy at his last place of residence with a grown-up person.

No cause was shewn during Hilary Term.

*Hector Cameron*, on moving the rule absolute, cited *Mayne* on damages 101, and *Lethbridge v. Mytton*, 2 B. & Ad. 772.

DRAPER, C. J., delivered the judgment of the court.

The law appears to me clearly settled, and the plaintiff is entitled to have his rule made absolute, if properly served. There are, no doubt, American authorities to the contrary; but it is very well observed by Mr. Mayne: "The American doctrine converts a covenant to pay off encumbrances into a covenant of indemnity against encumbrances, which it is apprehended is a very different thing." Besides here is a bond conditioned to pay off the encumbrances by a fixed day; and if there was any difficulty presented by the covenant the same objection does not apply to the broken condition.

But as the defendant has not appeared to the rule, we must, before making it absolute, see that he has been properly served. The affidavit merely states that a copy of it was left with a grown-up person (naming her) at defendant's last place of residence. It was not shewn that this grown-up person was in any way connected with defendant, as a mem-



ber of his family or otherwise, or that she was resident on the premises, or more than casually there. Every word of the affidavit would be literally true if the person who served the rule had taken the "grown-up person" with him to the premises and had then affected the service. And besides the rule was enlarged from Michaelmas Term to Hilary; and I am not satisfied that service of the enlarged rule was not necessary, though this case does not call for a decision of that point if really a doubtful one, where the defendant not having appeared to the action is not before the court.

We cannot therefore make the rule absolute.

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VAN ALLAN V. WIGLE ET AL.

The plaintiff took a bond from the defendants for £1000 conditioned for the faithful performance by one H. V. Deming of his duties as agent and clerk of the plaintiff in a store to be opened by Deming for the plaintiff at L. Subsequently the plaintiff sold to H. V. D. the goods, &c., at L., being the subject matter for which the bond was given without the consent of the sureties. *Held*, that the bond was thereby avoided. The plaintiff may take a nonsuit at any time before the pronouncing of the verdict by the jury; but not afterwards.

The declaration was on a bond, by which defendants jointly and severally with one H. V. Deming were bound to plaintiff in £1000, conditioned that as the said H. V. Deming would on the completion and delivery thereof, be engaged by plaintiff to manage a store about to be opened in the village of L., and would receive merchandise, money, and other things, the property of the plaintiff; then that the said H. V. D. should well and truly perform all the duties of manager of said store while he continued in that capacity, and should obey all proper instructions in writing which he might receive from plaintiff; and should do nothing to occasion loss to plaintiff, and should submit and exhibit his accounts when required, and at the expiration of his employment should deliver up all the money and property of plaintiff, notes and book accounts that might be in his hands. Breach—after averring that H. V. D. went into such employment and continued therein till 1st April, 1857, negating the performance of the different branches of the condition, and averring that H. V. D. converted the money, goods, and chattels, notes, and book

accounts to his own use. Pleas—1st. General performance. 2nd. That after plaintiff had established the store at L., and after H. V. D. had commenced to manage the same, and before any breach, the plaintiff without the consent of the defendants, entered into a different arrangement with the said H. V. D., and sold to the said H. V. D. the merchandise in the declaration mentioned, and all his interest in the store at L., together with the goods, business and transactions thereof, whereby the position of the said H. V. D. was changed without the knowledge or consent of the defendants, his sureties.

The cause was tried at Chatham in October last, before *McLean. J.* It was proved that on the 24th of October, 1856, some months after the plaintiff put H. V. Deming in charge of the store, the plaintiff and H. V. D. signed a memorandum as follows:

Balance due by Leamington store.....	£644	15	7
Less H. V. Deming's bill.....	41	3	9
	<hr/>		
	£603	11	10
Add cash before credited.....	5	0	0
	<hr/>		
	£608	11	10
Less $\frac{1}{3}$ .....	202	17	3
	<hr/>		
	£405	14	7
Less H. V. Deming's salary.....	37	10	0
	<hr/>		
	£368	4	7

Three payments each, payable in 7, 8,  
and 9 months.....£122 14 10

Above agreed to by us for the purchase and sale of the Leamington store and business. Payments to be made in amount and time as above.

Chatham, October 24, 1856.

For present purchase I take note at 90 days, drawn by H. V. Deming, payable to D. R. Van Allan & Co., or order, and endorsed by H. F. Deming and E. H. Deming, at Commercial Bank, London. Said note if H. V. Deming requires it shall be renewed twice: first, by paying  $\frac{1}{3}$ ; second, by paying  $\frac{1}{2}$ ; third, by paying the balance.

Signed, D. R. VAN ALLAN & Co.

Signed, H. V. DEMING.

Witness: Signed, ALEX. McPHERSON.

The plaintiff gave evidence to shew that this sale of the goods at the Leamington store was not effected; that H. V. Deming was to get the three notes, the consideration for that sale, endorsed by his sureties in the bond; the plaintiff in a letter put in, written by H. V. Deming, and addressed to plaintiff, dated the 6th December, 1856, in which he says his brother will not endorse a note for him, apparently alluding to the note for the last purchase of £141 worth of goods, which was proved by McPherson as independent of the value of the goods in the Leamington store. This is made more certain by the latter part of this letter. H. V. Deming sold all the goods in the spring following, and took notes for them in his own name and left the province. On the part of the defence it was proved that the plaintiff said he expected from H. V. Deming a note endorsed by his brothers for the new goods sold in October, 1856, : that the suggested the drawing up the agreement of 24th October, 1856, relative to the sale of the store; and that he did not want any notes for the goods in the Leamington store, as he considered himself safe on that score by the bond. Letters of the plaintiff to H. V. Deming were proved. On the 19th of December, 1856, he acknowledges the receipt of \$50, "which has been placed to the credit of your purchase of the the 25th ultimo," apparently a mistake for October. This letter was in answer to one written by H. V. Deming, in which he requests the remittance may be applied on *his last purchase*. On the 31st December, 1856, he acknowledges a further remittance of \$50. On the 21st of July, 1857, he acknowledges a further remittance of \$50, "which with what you have previously remitted leaves \$416 due upon your purchase of 25th October." And plaintiffs asks him to sign a note (enclosed) for \$400 and get his brothers to endorse it, and that H. V. D. should send \$8 to pay discount, and the plaintiff would throw off the other \$8. In a letter dated 27th January, 1857, he makes a proposal to H. V. Deming to take a span of horses and harness from him at \$300, and "apply the amount of the payment you are to make me in May." In May the first payment would have fallen due for the goods in the Leamington store, according to the agreement of 24th October, 1856. This evidence

was left to the jury, and they came into court and pronounced a verdict for defendants. Before it was endorsed on the *nisi prius* record and signed by the learned judge the plaintiff's counsel asked to be nonsuited. This was objected to on behalf of the defendants, and the verdict was recorded.

In Michaelmas Term *Becher*, Q. C., obtained a rule *nisi* for a new trial, on the ground that the verdict was against law and evidence, in this, that the bond contained in force, and that there was no sale of the goods to H. V. Deming, and on an affidavit of facts made by plaintiff, or why the verdict should not be set aside and a nonsuit entered, the plaintiff having elected to be nonsuited in sufficient time. He cited *Outhwaite v. Hudson*, 7 Exch. 380.

*O'Connor*, in Hilary term shewed cause, citing *Mayor of Berwick v. Oswald*, 3 E. & B. 653.

DRAPER, C. J., delivered the judgment of the court.

I am quite satisfied with the verdict, both on the law and evidence. The second plea is fully sustained. As to the plaintiff's rights to be nonsuited, I certainly have seen the plaintiff claiming to be nonsuited under precisely similar circumstances, and the claim has been allowed at *nisi prius*; but I am not aware that the question has ever been brought up before the court in term. In the passage cited from 3 Bl. Commentaries it is said with regard to the jury, that "before they deliver their verdict the plaintiff is bound to appear in court by himself, his attorney, or counsel, in order to answer the amerciamment to which by the old law he was liable in case he failed in his suit." If the plaintiff do not appear no verdict can be given, "therefore it is usual for a plaintiff when he or his counsel perceives that he has not given evidence sufficient to maintain his issue to be voluntarily nonsuited, or withdraw himself, whereupon the crier is ordered to call the plaintiff." The reason of this practice is given, and then it is said: "But in case the plaintiff appears the jury by their foreman deliver in their verdict." In *Sellon's Practice*, vol. 1, 466, after stating the law almost in words as it was stated in *Blackstone*, it is added, "but if



once he suffers the jury to pronounce their verdict he cannot prevent its being recorded and elect to be nonsuited." And the language used by *Parke*, B., in *Outhwarte v. Hudson*, is consistent with this dictum: "At common law the subject has a right to be nonsuited at any stage of the proceedings he may please, and thereby to reserve to himself the power of bringing a fresh action for the same subject matter." "The plaintiff's power of demanding to be nonsuited continued to the last moment, *until the jury had given their verdict*, or where the case is tried by a judge without the intervention of a jury *until the judge has pronounced his judgment*." But it is not said, until the verdict of the jury or the decision of the judge on the matter of facts is entered of record. It seems to me the practice as stated by *Sellon* is founded on principle and reason. Unless the plaintiff appears, the jury cannot "give" or "pronounce" their verdict. To say the plaintiff shall be treated as making default in appearing after having appeared to receive it, and thereby having procured the jury to deliver it, involves a contradiction. The act of recording the verdict is the act of the court, not of the jury, and though it is the practice after it has been recorded to ask the jury to hear whether the record corresponds with their finding, yet the verdict is given of necessity before it can be recorded; and being given, the plaintiff cannot I think be allowed to withdraw and nullify it. It is said that in *replevin*, where both parties are actors, though the plaintiff be nonsuited, the jury may assess damages for the defendant, and under our statute, if a set-off be placed, the jury may give to the defendant damages for the excess of his demand proved over that which the plaintiff has established. It does not seem to me that the plaintiff, after putting the defendant to the trouble and expense of proving his demand, should be permitted to defeat the right given to the defendant by statute to have a verdict and damages in his favour any more than in *replevin*. However, we are not called on to decide that point now.

I think therefore the rule should be discharged.

## HARBOURN V. BOUSHEY.

*Ejectment—Taxes—Sheriff's deed.*

*Held*, that the vendee of the sheriff upon a sale for arrears of taxes, which did not appear to be clearly due, was not entitled to recover.

*Quære* as to the effect of a conveyance under the 65th sec. of the statute 16 Vic., ch. 182.

EJECTMENT for 13 acres of land, situate on the front angle of the westerly side of No. 16, 2nd concession of the township of Dover East, according to the patent to James Understone, dated in 1798. Defence for the whole.

The plaintiff gave notice of title as grantee from Thomas Hamilton, to whom the same was devised by one William Hamilton, devisee of John Hamilton, to whom the land was transferred by Joseph Wood, devisee of James Wood, who held by conveyance from Isaac Todd, who held by conveyance from John Askin, who held by conveyance from James Understone, the grantee of the crown. The plaintiff also claimed by possession.

The defendant gave notice that, besides denying the title of the plaintiff, he asserted title as vendee of John B. Williams, the vendee of George Thomas, and John S. Vosburgh, vendees of John Mercer, Esq., sheriff of the county of Kent, who sold under authority of a warrant from the treasurer of that county for arrears of taxes due on said lot No. 16, whereof the premises claimed formed part.

At the trial, in October last, at Chatham, before *McLean*, J., the plaintiff gave sufficient evidence of his title to enable him to recover, and the whole case turned upon the question of the validity of the sheriff's sale for taxes. The treasurer's warrant bore date on the fifteenth day of May, 1854, and was for taxes due up to the 31st December, 1853. It recited that the taxes or some part of them had been due for five years, next preceding that day (31st December). Evidence was given that one Planquiere had gone into possession as a tenant eighteen years ago, on an agreement that he should pay the taxes on the whole lot, and should make certain clearing. He swore he paid taxes on the whole lot for six years after he entitled, and then for four years that he paid taxes on the east half, on which he resided and had

made his clearing, and that for the remaining four years he paid taxes only on what he had enclosed, being about 20 acres, and that he quitted possession in April, 1853. But on the other hand it was distinctly sworn by the reeve of the township, that he was collector for that township in 1847-8-9, and that he received and paid over to the treasurer the taxes on the whole lot for those years, and he also proved that the taxes for 1845-6 had been paid. And another witness proved that the taxes had been paid on the whole lot for 1850. The rolls and other public documents had been unfortunately destroyed by fire, and the municipal council had great difficulty in ascertaining what lots were in arrear for taxes. They had appointed a committee of their own body to enquire, who had reported this whole lot as in arrear for the sum of £10 4s. 9d., and it was upon this assumed arrearage—from 1838 to 1850—that the treasurer's warrant was founded; but no proof whatever was given how this amount was arrived at. The learned judge told the jury that, unless the evidence satisfied them some taxes were due for five years, the plaintiff was entitled to a verdict, and that it would, in that case, be unnecessary to enquire as to what rates had been imposed, or by what authority, or whether as much as £10 4s. 9d. had been lawfully imposed. The jury found for the plaintiff.

In Michaelmas Term, *Duck* obtained a rule *nisi* for a new trial on the law and evidence and for misdirection, citing 16 Vic., c. 182, secs. 55 and 58; 16 Vic., c. 183, secs. 2, 3, 4, 5 and 6; *Jarvis v. Brooke*, 11 U. C. Q. B., 299.

*McCrae* shewed cause, citing *Stafford v. Williams*, 4 U. C. Q. B., 488; *Doe Upper v. Edwards*, 5 U. C. Q. B., 594. He contended that during all the years in which Planquiere was occupant, and in which the evidence shewed the whole lot had been assessed, there was distress upon the lot, and the collector for each year could have levied the amount thereon, if it had not been paid to him, and that the whole lot must be assumed to have been assessed as occupied.

DRAPER, C. J., delivered the judgment of the court.

It might be questionable if there were any arrears of  
59 (to 60.)

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taxes at all, whether they should not have been ascertained under the provisions of 16 Vic., ch. 183, and have been levied accordingly. No statute gives authority to a committee of any township council to ascertain the sums in arrear, or make their report on such a matter, as authority upon which the treasurer's warrant can be issued.

But it appears to me that the jury were properly directed on this evidence, to say whether it satisfied them that any taxes at all were in arrear, and I am further of opinion that they were warranted in finding for the plaintiff, on the ground that no such arrearages were satisfactorily established. It is unnecessary to go into the various other questions which have been suggested, because, unless there was sufficient proof that taxes were in arrear, the defendant's title wholly fails, and no objection has been raised before us that the plaintiff gave insufficient proof of his right to the possession of the premises.

It has been suggested that the legislature, by the wording of the 65th sec. of the stat. 16 Vic., ch 182, have indicated an intention, that if the sheriff executes a deed of sale of land sold for taxes, such deed will pass the estate absolutely. The clause is: "That if the land be not redeemed within the period hereinbefore allowed for its redemption, the sheriff shall, on the demand of the purchaser, at any time after the expiration of the said period of one year, and on payment of the sum of five shillings to him by the purchaser, execute and deliver a deed of sale of such land to the purchaser, his heirs and assigns, and such deed shall state the date and cause of sale, and the price, and shall describe the land by its situation, boundaries and quantity, and shall have the effect of vesting the land in the purchaser, his heirs and assigns in fee simple, free and clear of all charges and incumbrances thereon, except taxes accrued since those for the payment whereof it was sold." The 18th sec. of 6 Geo. IV., ch. 7, was, "that if at the expiration of twelve calendar months from the time of such sale, the land so sold shall not be redeemed as aforesaid, then the sheriff for the time being shall, on demand by the purchaser or purchasers, his heirs or assigns, execute a conveyance to



him or them in fee simple of the parcel of land so sold by public auction, under the provisions of this act, according to the form given in the schedule."

Assuming taxes to have been due, and the proper proceedings adopted, and bearing in mind the 22nd section of the act of 6 Geo. IV., which expressly provides that sales shall not be avoided by reason of the neglect of any officers having duties to perform in regard thereto, in not adhering to the modes and forms of proceeding thereby established, I am not prepared to hold that a deed executed under the 18th sec. of that stat. would not have the same operation as one made under the 65th sec. of the latter act of 16 Vic. At all events I am not prepared to decide, that the expressions used in the later enactment, with the respect to the effect and operation of the sheriff's deed are to make it a valid and binding conveyance, notwithstanding it should clearly appear that the owner had regularly paid the taxes every year as they accrued, and that the sale arose from an omission (accidental or wilful) to make such returns and entries as would shew the payment in the proper rolls and books. I think that, notwithstanding the execution of the sheriff's deed, the owner must be heard to prove that there was no debt in arrear for which his lands could be sold, and therefore, in my opinion, this rule should be discharged.

Rule discharged.

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### FAIRMAN V. MAYBEE.

#### *Mortgage—Promissory Note—Merger.*

Where a debtor gave to his creditor a mortgage and promissory notes for the same debt—the latter payable at the same times as the instalments of the mortgage, and no allusion was made in either instrument to the other. The creditor subsequently passed both instruments to third parties, as collateral securities for debts due them. Upon ejectment brought in default of payment of an instalment in the mortgage, the defendant proved the facts, and that he had paid the note given for the same instalment.

*Held*, that the plaintiff was entitled to recover,

*Quære*, did not the note merge in the higher security.—*Draper, C. J.*

EJECTMENT to recover the west half of No. 18, 6 con., Rawdon, in the county of Hastings. Plaintiff, in his notice, claims to be entitled to possession under a mortgage from

defendant to one Daniel Badstone, conditioned that Badstone might re-enter, in default of payment of any of the instalments, mortgage dated 1st September, 1854, and assigned by Badstone on 27th October, 1855, to plaintiff, who proceeds in this action, defendant having made default of payment of an instalment of £25 and interest. Defendant does not appear to have served any notice.

At the trial, before *Richards*, J., at the last fall assizes for the county of Hastings, there was produced in evidence a mortgage from defendant to Badstone, with a proviso, conditioned that the same should be void on the payment of £325, with interest, by instalments as therein mentioned; amongst others there is one of £25 and interest, due on the 1st day of January, 1857. There is also a covenant to pay the money mentioned in the proviso, and a clause of re-entry on default of performance of the conditions of the proviso. There is also a clause providing that defendant might quietly enjoy on observing and performing the conditions, &c. The mortgage was registered in the registry office at Hastings, on 29th October, 1855.

Assignment of the mortgage from Badstone to plaintiff, dated 27th October, 1855, consideration £150, for his own use and benefit, with a power of attorney to collect the same in his (Badstone's) name, and a covenant that £150 and interest was due on the mortgage. The assignment was registered in the county registry office, November, 1856.

A promissory note from defendant, payable to Badstone, or bearer, for £25 and interest, dated 1st September, 1854, was produced on behalf of defendant, and a subscribing witness to the note and mortgage proved that it was given as collateral to the mortgage.

¶ A witness called on behalf of defendant, proved that Badstone was indebted to him in about £20, and before the mortgage was assigned to plaintiff: that Badstone had assigned it to him and delivered him the promissory notes—amongst others the note for the instalment due 1st January, 1857: that the assignment to him was not registered: that the note was paid to him in October, and never went out of his hands from the time he received it until it was paid:

that before the payment of the note, Badstone got the mortgage from him, as he said, to assign it to plaintiff as collateral security : he did not tell plaintiff there were any notes.

The learned judge directed the jury that, where two instruments were executed at the same time for the payment of the same sum of money, the lesser security merged in the greater, unless there was some intention it should not so operate expressed at the time. That here there was no reference to the notes in the mortgage, and an express covenant to pay the money without reference to the notes, and that plaintiff might well suppose there was no collateral securities in relation to it. That if the defendant gave the notes and the mortgage without taking the precaution to have it appear that they were for the same debt, it was his own fault, and plaintiff was not to blame for it. On this a verdict for plaintiff was taken, with 1s. damages.

*Walbridge*, Q. C., for defendant, contended that the notes did not merge in the mortgage, and that the payment of the £25 and interest to the holder of the note is a compliance with the covenant to pay according to the proviso contained in the mortgage.

Leave was given to defendant to move to enter a nonsuit, on these grounds.

In Michaelmas Term, *Walbridge* accordingly moved to enter a nonsuit pursuant to the leave reserved.

In Hilary Term, *O'Hare* shewed cause. He cited *Mathewson v. Brouse*, 1 U. C. Q. B., 272 ; *Murray v. Miller*. ib., 353, and *Parker v. McCrae*, 7 U. C. C. P., 124.

*Walbridge*, contra, cited *Burton v. Barclay*, 7 Bing., 745 ; *Holmes v. Bell*, 3 M. & Gr., 213 ; *Filmer v. Burnby*, 2 M. & G., 529 ; *Drake v. Mitchell*, 3 Ea., 259 ; *Yates v. Aston*, 4 Q. B., 182.

DRAPER, C. J., delivered the judgment of the court.

I am of opinion the rule should be discharged. It cannot be said that the mortgage is a collateral security for the notes—it does not refer to them, and it contains an express covenant to pay the instalments on the mortgage as they fall due. The plaintiff, as assignee of the mortgage, had no

notice even that such notes were given, while the defendant was necessarily aware that he had given both notes and mortgage, and it was his duty to see that he paid the money to the proper person. Even if there would have been no defence to an action by the holder of the note—if he had taken it *bona fide* without notice, it would, in my opinion, make no difference. The sum to be paid on the note and on the mortgage falls due on the same day. If sued by the holder of the mortgage for default, it would be no answer that he was also liable on the notes in the hands of another party. But I incline to agree with the learned judge at the trial, that the simple contract debt was merged in the higher security—and unless (which was not pretended) the notes were given and accepted in satisfaction of the debt and covenant in the mortgage, the remedy on the deed is not affected even by payment of the notes to a third party who may happen to hold them. It is not as if the notes were, by the terms of the mortgage, treated as the existing debt, and the mortgage was given only as collateral security. It is argued that the defendant may thus be compelled to pay the debt twice, but even if so, it is his own fault, for he has enabled the original mortgagor to commit a fraud, by assigning the note to one and the mortgage to another.

Rule discharged.

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### HUTCHISON v. ROBERTS.

*Interpleader—Change of possession—Stat. 20 Vic., ch. 3.*

*Held*, that an assignment for the benefit of creditors, accompanied by an immediate and continued change of possession did not come within the statute 20 Vic., ch. 3, and was valid under the former statutes.

An interpleader summons was issued in this cause at the instance of the sheriff of Halton, who, upon a writ of *feri facias* issued on the 1st day of December last, had on the 24th of December seized the goods and chattels in a shop at Oakville which had been for some time previously and still was occupied by defendant, and where he had carried on business. The goods were claimed by James Jackson, who by his attorney gave the usual notice to the sheriff. On the



9th of January last Sir *J. B. Robinson*, C. J., at the instance of the plaintiff, the judgment creditor, and of the claimant, enlarged the summons until the first Friday of Hilary Term, the whole question of the rights of both those parties to the goods and chattels seized by the said sheriff to be then brought before this court, on the affidavits then produced, both parties consenting to abide the decision of this court; and that this court might make such order as they think just as to all costs attending this application. The judgment creditor admitting that the duplicate of the assignment under which the claimant claims the said goods and chattels, with due affidavits of execution and of said claimant as bargainee on said assignment, were duly registered in the office of the clerk of the county of Halton with said clerk, pursuant to the statutes in such cases made and provided.

The assignment was produced, made between Charles L. Roberts of the first part, James Jackson of the city of Toronto, merchant, of the second part, and the several parties, creditors of Roberts, who should come in and execute the assignment of the third part. It bore date the 25th of November, 1857, and recites that Roberts was indebted to the parties named in schedule A., and is unable to pay his creditors in full, and is desirous of assigning his estate and effects to Jackson in trust, and that Roberts' assets consist of his stock-in-trade, books, debts and accounts set out in schedule, B., of the supposed value of \$3,500.92½, and witnessed that in consideration, &c., Roberts did grant, bargain, sell, &c., unto Jackson, his heirs, executors, administrators, and assigns forever, "all and singular the stock-in-trade, wares, merchandise, fixtures, goods, chattels and effects" of him the said Roberts, "situate or being in or upon the shop, store and premises connected therewith, now in the occupation of the said Charles L. Roberts, situated in the said village of Oakville, and all other the goods, chattels and personal property whatsoever of him the said Charles L. Roberts, wheresoever situated (except his household furniture, goods, chattels and effects situate and being in or upon the dwelling house of the said Charles L. Roberts, and which are covered by a bill of sale for an amount supposed to be the full value thereof, and

also except his wearing apparel and that of his family), and all the book debts, moneys, notes, bills, bonds, mortgages and choses in action whatsoever, either at law or in equity, of him the said Charles L. Roberts, to have and to hold, &c., upon trust after paying expenses, taxes, &c.,—1st. To pay himself \$369.55. 2nd. To pay W. F. Romain \$100. 3rd. To distribute the residue rateably among all Roberts' creditors who execute the deed within a limited time. It is provided that Jackson, the trustee, may employ Roberts in collecting and disposing of the trust estate.

For the claimant were filed the following affidavits: 1st One sworn by himself on 9th January, 1858, stating that at the time of executing the assignment he too actual, visible, and tangible possession of the goods assigned; that the store in which the goods were, was at the time of executing the assignment locked up and the key delivered to him, and he kept possession of it until the 7th December, 1857: that Roberts' sign was taken down and every thing was done to make the transfer public and notorious. That on the 28th November a notice of the assignment was mailed to each creditor of Roberts (among them one to the plaintiff) inviting them to come in, and a notice also to each debtor, of the assignment, and requiring him to pay to the assignee; that he took stock of the goods assigned on the 30th of November, and was assisted by one Frederick Butler: that the goods can be fully identified, as no addition was to be or was made thereto: that on the 6th December he sent the key to Roberts, with instructions to sell the goods and to collect the debts as fast as possible, and as his (Jackson's) clerk and agent to make weekly returns of the sales and collections, with the amount of cash received; and that the business was to be conducted in his (Jackson's) name, and all receipts so given, and that Roberts did make weekly returns, &c.: that the goods so assigned are those of which the greater portion has been seized by the sheriff: that the assignment was made in perfect good faith; that the said goods have never been out of his possession, either by himself or his authorised agent (Roberts), since the assignment until the seizure, until which time he had the whole control and management thereof.

2nd. Affidavit of Frederick Butler, on 7th January, 1858, to the execution of the assignment and duplicate on 25th November, 1857; that possession was given to Jackson at the time of the execution; the store locked and the key delivered to Jackson, and Robert's sign taken down; that the change of possession was continued and notorious; that there can be no difficulty in identifying the goods from the description in the assignment: that he assisted in taking stock, and can perfectly identify the goods as well as if there were a schedule taken and annexed to the assignment: that the store remained shut up until the 7th December following.

3rd. Affidavit of Charles L. Roberts, the judgment debtor, sworn the 9th January, 1855, that the assignment was executed in the store occupied by him at Oakville, and possession of the goods and stock-in-trade was thereupon immediately delivered to Jackson: that a change of possession then took place "actual, visible and notorious," and was continued: that the store was immediately shut up and the key delivered to Jackson, and his (Roberts') sign taken down: that the duplicate assignment with an affidavit of due execution by Butler, and an affidavit of Jackson that the assignment was *bona fide* and for good consideration, as mentioned therein, and not to enable him (Roberts) to hold the goods against his creditors, was filed in the office of the clerk of the county court of Halton, on the 26th November, 1857: that the store remained shut until the 7th December, during which time Jackson had actual and visible possession of the property assigned, and had the key, and that he (Roberts) was not in the store during that time, and that the change of possession was notorious: that on the 7th December Jackson sent him instructions as stated in his affidavit, and that he (Roberts) then opened the store and commenced selling and collecting, and rendered accounts and remitted proceeds to Jackson, and in so doing acted entirely as Jackson's agent, and did all the business in his name and for the benefit of the parties executing the assignment: that bills were printed and circulated in Oakville announcing the sale as of a bankrupt stock; and Jackson's name was printed as assignee, and

Roberts as agent: that he never did any thing connected with the said stock-in-trade except as agent, after the assignment, which was executed in good faith and for the benefit of creditors: that no possible difficulty could arise in identifying the goods; and that no addition was or was to be made to them after the assignment, and that they are the same as are seized by the sheriff.

*S. Richards* on behalf of the claimant, said that so far as the bill of sale was concerned the whole question was, whether there was a sufficient description of the property assigned by the bill of sale, so as to comply with the 4th section of the statute 20 Vic., ch. 3, "All the instruments mentioned in this act, whether for the sale or mortgage of goods and chattels, shall contain such full and efficient description thereof that the same may be thereby readily and easily known and distinguished." He argued that this was a direction only: that there was not as in preceding clauses an enactment that in the absence of such description the instrument should be void: that the description given as of all the goods, &c., in a particular building was a sufficient description according to the statute, and as efficient as all the goods mentioned in a particular schedule, and that the deed would not be *void* for want of such a description, unless it was left wholly uncertain what goods were to pass. But even if the court thought the description not full and efficient to comply with the act, in this case the assignment, which was absolute and not defeasible, was accompanied by immediate delivery, and followed by an actual and continued possession of the goods and chattels sold, and therefore did not require the aid of the statute. He cited *Taylor v. Whittemore*, 10 U. C. Q. B. 440; *Heward v. Mitchell*, 10 U. C. Q. B., 535; *Foster v. Smith*, 13 U. C. Q. B. 243; *Ross v. Conger*, 14 U. C. Q. B. 525; *McPherson v. Reynolds*, 6 U. C. C. P. 491.

*Burns*, contra, urged that there was nothing in the assignment which could be called a *description* of the goods and chattels; the only description was of the *place* where the goods referred to were. No one reading the assignment could tell whether the goods consisted of grain, provisions, dry goods, groceries, liquors, or hardware, any or all of these



or other kinds of goods. The description is not even full enough for so general a classification as that, which it might well be argued would be insufficient since the statute, though the cases cited shew it would have been held sufficient before. He also objected that the assignee, Jackson, could not have taken the necessary oath, as he was a trustee, referring to *Olmstead v. Smith*, 15 U. C. R. Q. B. 421. He also argued that the assignment could not operate at common law, and cited *Short v. Ruttan*, 12 U. C. Q. B. 79.

DRAPER, C. J., delivered the judgment of the court.

The court in the present case are called upon to decide on the facts as well as on the law.

If the claimant's right depended altogether upon the assignment as an effectual instrument under the statute, I should require further time for consideration before I could hold that a full and effectual description of the goods intended to be conveyed is given by such words as "all my stock-in-trade, goods, wares, and merchandise in my store situate at, &c. I cannot at present see that an instrument so drawn would contain a *full* and *efficient* description of such goods. It appears to me the statute must mean that by reading the instrument itself, or at most aided by a schedule attached to it, such a description should be obtained as to convey to the reader, at least a knowledge of the general character of what was meant to pass, whether it was flour or whiskey, ploughs or penknives, an assortment of millinery or a quantity of cables and anchors. Under such an assignment it would be indispensable to make an inventory, to take stock in order to know the nature, quantity, quality, and value of the goods assigned; and I confess I feel it difficult to hold that in the absence of these four elements how a description can be called full and efficient. All that can be said is, that the case falls within the maxim, *id certum est quod certum reddi potest*; but that was the law before the statute; and we must suppose the legislature intended to require a greater degree of certainty than might have sufficed before.

But if there has been an immediate delivery of the goods, followed by an actual and continued change of possession,

then the claimant, no longer requiring to invoke the aid of the statute, is no longer bound to comply with its provisions. His assignment, accompanied with such delivery, and followed by such possession, requires neither proof by particular affidavits nor filing within a specified time; and if it contain such a certainty of description as was held sufficient under the former acts, (and the cases cited by Mr. *Richards* shew that it does,) it is a good assignment at common law, and the property will pass by it. And I think the facts stated warrant this conclusion, and that on this ground we should decide in favour of the claimant.

I do not think it was open to Mr. *Burns* to object to the sufficiency of the claimant's affidavit, because in the enlargement of the summons made by Sir *J. B. Robinson*, it was expressly stated as an admission made by the judgment creditor, that the duplicate assignment under which the claimant claims the goods and chattels, with *due affidavits* of execution and of *said claimant* as bargainee in said assignment, were duly registered, &c.

Our judgment is that the goods seized by the sheriff were not and are not the property of Charles L. Roberts, the defendant in this cause, and were not and are not liable to be taken in execution to satisfy his debt, and that the sheriff do withdraw from the possession thereof, and that the claimant, James Jackson, was and is entitled to hold the said goods; and that he do receive the costs of the attending on the interpleader summons, at chambers, and the costs of attending and arguing the same in this court.

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#### WILSON V. CUTTEN.

##### *Racing—Deposit.*

Two parties, W. & L., each deposited £50 in the defendant's hands to be run for by their horses on the following terms: L.'s horse (Butcher) was to distance W.'s horse (Warrior) three times out of five, in mile heats. Two heats were run; the first one Butcher did distance Warrior, the second one Warrior distanced Butcher, when his owner contended that he had won the race, as a distanced horse could not run again.

*Held*, that as the usual rule of racing (that a distanced horse cannot run again) was properly held inapplicable. It must be set aside absolutely, and the race was not won.

At the trial, before *Hagarty, J.*, at Hamilton, it appeared

that this was an action to recover from the defendant a sum of £100, being £50 deposited in his hands as stakeholder by plaintiff, and £50 by one Lovell on a bet between them on a race between their respective horses. The deposits were admitted.

One Anderson proved the bet. Lovell bet that his horse Butcher would beat and distance plaintiff's horse Warrior three times out of five, mile heats, a mile distance, that is, 100 yards in the mile. The money deposited with defendant on this understanding. There was some writing shewing terms of the bet left with defendant.

J. W. Bastedo swore that he was one of the judges of the race. The conditions were discussed before the race. Plaintiff objected unless the terms were altered, as he dissented from the constructions of the writing. They thus agreed to run mile heats, Lovell's horse to distance plaintiff's three times out of five. They started on that understanding. Six judges were present: Davis, Miles, Thompson, and two men from Galt, and witness. First heat Butcher was declared to distance Warrior. Second heat, Warrior (plaintiff's horse) distanced Butcher. Butcher did not again start. Heard Lovell tell his driver to take the horse home. Judges decided that Lovell's horse was distanced. A memorandum produced was signed by witness and three other judges. It was our decision.

A distanced horse cannot run again. Having been distanced once, Lovell's horse could not run again. There was no difference of opinion in this. On cross-examination he said plaintiff appointed him in Lovell's presence, and the latter called out the judges from the rest on the ice. On this he was not positive: could not say in fact how the other judges were appointed. He heard no dispute that day on the ice. Next day the memorandum was signed. Davis signed before the witness. Plaintiff contended on the ice he had won the money, and did not refuse to run the next three heats.

Milton Davis said he was appointed one of the judges, and gave somewhat similar evidence. Did not see the start in the second heat, but saw plaintiff's horse coming in and Lovell's horse going towards the shore. Plaintiff said he had

won the money, and would not start again unless judges decided he should. Witness did not make up his mind till next morning, till he had consulted others. Then signed the paper. There was no meeting of the judges to decide, and no decision on the ice.

Thomas Miles said he had bet on plaintiff's horse. Lovell knowing this, consented to his acting as a judge. On the second heat Lovell's horse ran off the course towards the shore. Plaintiff then claimed the money. Witness and Davis agreed that Lovell's horse being distanced, could not start again, and signed decision next day.

For defence, *Mr. Freeman* objected that plaintiff failed as only two heats were run out of five, and Lovell might still have won three out of five. He then called Smith and Scott, the two judges from Galt. On their evidence it appeared that after the first heat Lovell contended he ought to get the money, as he had distanced plaintiff. This was refused, plaintiff contending they should have run five heats, whereas, only two were run and in the second heat Lovell's horse bolted. Plaintiff refused to run a third heat, and consequently Lovell sent his horse home, having first brought him back to the course. There was no meeting or decision of the judges on the ice. Witness heard they were to meet that evening at the City Hotel. One of them, Smith, went there, but no one came. The other, Scott, was not notified to attend any meeting. These two differed in their understanding of the right of a distanced horse to run again. One had never so understood the rule. These two had joined in no decision.

After *Mr. Freeman* had addressed, or as he was addressing the jury for the defence, he objected that there was no demand proved on defendant as a stakeholder for the £100, and as the case was opened for the full amount, he would not even recover the £50 which he had deposited.

It was left to the jury to say what the true contract between the parties was. Did they appoint judges, and was the agreement to abide by their decision or the decision of a majority of them? If so, was there in fact a decision in accordance with the contract, in favour of plaintiff?



The onus was on Lovell to distance plaintiff's horse three out of five times. He certainly did not do so in point of fact. What prevented this? Or was the race after two heats abandoned by mutual consent.

The jury found for the plaintiff, and £100.

In Michaelmas Term, *Freeman* Q.C., obtained a rule *nisi* for a new trial on the law and evidence, and for a misdirection, in not telling the jury that all the judges should have met or have had notice of the meeting before any legal decision could be made, or why the verdict should not be reduced to £50, if the court should be of opinion the plaintiff is entitled to recover his own deposit.

In Hilary Term, *M. C. Cameron* shewed cause. He referred to *Fulton v. James*, 5 U. C. C. P. 182.

*Freeman*, contra.—This was not a common race subject to the rules of the turf, but a special agreement to be disposed of on its own terms. According to the terms of the agreement the plaintiff has not won, nor have the judges decided in his favour, for two of the judges had no notice of a meeting to make a decision, nor did all the judges ever meet at all. He cited *Dixon v. Zizinia*, 10 C. B. 602.

DRAPER, C. J., delivered the judgment of the court.

*Fulton v. James* clearly establishes that the parties have a right to discuss this question in a court of law, though a rigid application of the words of the English acts, 13 Geo. II., ch 19, and 18 Geo. II., ch. 34, would require the race to be for £50 sterling money of Great Britain, which £50 currency certainly is not.

According to the evidence, it is a rule of horse-racing that no distanced horse can start again; and if that rule be properly applicable in this case, it would be at once disposed of. But it is necessary to understand what the contract was. It was that Lovell's horse, Butcher, should beat and distance plaintiff's horse, Warrior, three times out of five, mile heats. Not that five heats must be run, but that not more than five were to be run, of which the horse Butcher was to win three by distancing the other horse each time. The first heat was run and Butcher did distance Warrior. The second was run

and Warrior distanced Butcher, and no more heats were run, because, according to some of the witnesses, the plaintiff refused to run again, claiming that Butcher was a distanced horse, and could not run again. It was proved that Lovell had made a similar claim after the first heat when Warrior was distanced, but it was disallowed by the judges on the ice. No formal decision was made by the judges at the time. Four of them decided in plaintiff's favour the next day.

In my opinion this contract must be decided upon by its own terms. It is from those terms clearly exceptional to this general rule of horse-racing, for otherwise, the plaintiff's horse, Warrior, having been distanced in the first heat could not start again, but the absurdity of this was apparent, and the judges very properly decided, that the undertaking being, that Lovell's horse should distance the other three times, took the race out of the meaning of that rule. But if the rule could not apply in favour of one of the parties, because of the particular terms, I see no reason for applying it to the other. Once it is admitted that there must inevitably be an exception to a general rule, we must look to the contract itself, and determine who is entitled to succeed by its expressed terms. As a legal question, it appears to me the event has not come off which entitles the plaintiff to the stakes, though very probably as a horse-racing question, it would be held otherwise. I do not find any evidence which shews the decision of the judges was to be conclusive, assuming that the decision of the majority was properly given. The plaintiff is, however, entitled to recover back his stake, for there has been no race, and the time is gone by. Unless the plaintiff will reduce his verdict to £50, there should, in my opinion, be a new trial without costs.

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## MURTON V. SCOTT.

The plaintiff leased land and entered into a covenant to leave some acres sown to be paid for by the landlord at a valuation upon the termination of the term. The defendant purchased the reversion from the landlord, and treated for the sale of the crops at the valuation, assuming acts of ownership.

*Held*, that by his acts he had assumed the landlord's liability, and was responsible under the lease.

DECLARATION on an award made by three arbitrators, payable by defendant to plaintiff, and common counts, and for the value of certain wheat sown by plaintiff on land occupied and leased by plaintiff, and sold to defendant, and for which defendant promised to pay plaintiff. Pleas—1st. Never indebted. 2nd. Set-off.

At the trial in October last at Guelph, before *Burns, J.*, a lease from one Husband to the plaintiff was put in, by which Husband devised a certain farm (late in his own occupation) to plaintiff for a term of five years, ending 1st of April, 1857. It contained the following clause: "And the said George Murton, for himself, his heirs, executors, and administrators doth hereby covenant with the said William Anthony Husband, his heirs and assigns, at the expiration of the above term to leave twelve acres of meadow or pasture land, also to leave eight acres of land sown down with good and proper seeds, and harrowed in in the spring preceding the expiration of said term, without any allowance for the same. And he further covenants that he will not at any time grow more than two white crops in succession, also twenty acres of fall wheat sown either on a good fallow or on a pea stubble: he the said George Murton, his heirs, executors, and administrators being allowed for the same as valued." It was admitted at the end of the case that the defendant was the owner of the land; and he and the plaintiff respectively named a person to value. These persons went and valued the wheat on the 8th June, and not agreeing, named a third; and on the 9th June, 1857, after the wheat had been examined, a writing as follows was signed by plaintiff and defendant:—"Guelph, June 9th, 1857. We hereby appoint Ewan Macdonald and John McCrae (with power to choose a third man) to value a piece of wheat on the land of Robert

Scott, and bind ourselves to abide by their valuation." And the two parties named, with a third chosen by them, signed a paper as follows :—Guelph, June 9th, 1857. We, Ewan Macdonald and John McCrae, to whom was referred the valuation of a certain piece of wheat on the farm of Mr. Robert Scott, having chosen Mr. F. W. Stone as third man, and having measured the wheat ground and determined the value thereof, decided as follows, viz.,  $7\frac{1}{2}$  acres wheat : value thereof £37 10s. Od. currency ; expense of the valuation to be equally divided." The arbitrators, as was proved, valued the wheat crop—not merely the expenses of putting it in, seed ploughing, &c. The defendant complained of this insisting the latter was the meaning of the lease, while they conceived the lease had nothing to do with it. The defendant had sent the lease to his own referee, but did not speak as to the principle of valuation until after the award made ; and after this he negotiated with plaintiff's referee to sell the wheat to him. For the defendant it was urged, that he had a right to insist on the true construction of the lease, and that the parol submission could not and was not intended to waive this right, and that the true construction was the value of putting the wheat in, and not the prospective value of the wheat when ready for harvest.

The learned judge left it to the jury to say what was referred to the parties. They found the reference was of the value of the wheat, independently of the terms of the lease, and gave the plaintiff a verdict for £37 10s.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection in this, that the evidence shewed the parties who made the valuation were merely valuers, and not arbitrators ; and that no assumpsit arose to pay the amount of their valuation on request ; while the learned judge directed that they were arbitrators, and their decision an award. Also that the evidence shewed the written submission was made after the valuers had decided, and defendant had no opportunity of being heard, and that the valuation was made upon an erroneous principle. He cited *Jenkins v. Betham* from *Russell on Awards*, 195 ; and *Anon* 2 Chit. 44.



*Freeman* shewed cause in the following term, arguing that on the evidence it was clear defendant had a crop of wheat, for which he was bound to make compensation to the plaintiff, to some extent; and that the rule does not complain of excessive damage directly; but that a wrong principle of valuation was adopted; but the defendant adopted the valuation itself when he offered to sell the crop according to it.

DRAPER, C. J., delivered the judgment of the court.

I am not satisfied this is to be viewed, strictly speaking, as a submission to arbitrators and an award founded thereon. Both parties seem to have agreed that the defendant was to pay for the crop of wheat left in the ground at the expiration of the term, 1st April, 1857. The nature of defendant's title appears to be as assignee of Husband, not claiming by title paramount. I am not prepared to hold that the plaintiff could have maintained an action against *him* on the lease for the value of the wheat crop. But there is evidence enough to shew that he dealt with the plaintiff as having an interest in the crop, and agreed to name parties to value that interest, and to pay the ascertained amount. The reference made by him to the lease is so far important as to shew *quo animo*, he joined in submitting the question of value of the wheat to the parties named, for by the lease the plaintiff was to be "allowed for the same *as valued*." There was no controversy about right, the only question was value. In this respect the case resembles *Jenkins v. Betham* (15 C. B. 168) cited by Mr. *Cameron*, where valuers appointed to ascertain the amount of delapidation, with power to appoint an *umpire*, were held not to stand in the situation of arbitrators, though for reasons having no application whatever to this case.

But whether we treat this as an award founded on a parol submission of the amount of compensation to which the plaintiff was entitled under the lease, or a reference to parties to determine how much the wheat was worth, the defendant having agreed to buy it from the plaintiff at the price so to be ascertained, the evidence given at the trial clearly

shewed that though the defendant expressed himself dissatisfied with the sum, yet he ratified the determination by afterwards offering to sell the wheat at the price ascertained, treating it as having fully become his own, by the settlement of the price to be paid. If the defendant be properly liable in this action to pay the ascertained value, it makes not difference whether it be as for a sum awarded or as a piece of an article that he agreed to take, to which the plaintiff had some title. We should not grant a new trial, even though the charge were wrong, if upon the pleadings and evidence the plaintiff made a sufficient case to recover on a different ground. The plaintiff has a claim to be allowed the value of a crop of wheat left by him in the ground at the expiration of his term. The defendant has purchased the reversion from the landlord, and as I understand is now seized in fee simple in possession. By his acts he has plainly admitted that whatever the original lessor was liable for, he has by the purchase from him become liable for, and in dealing with the plaintiff he has recognised the right reserved in the lease as existing in the plaintiff's favour and as binding on himself. In the absence of direct proof of the defendant's contract with the lessor, there is enough to shew that the defendant had undertaken to do, with regard to this wheat, whatever the lessor was bound to do. By paying the plaintiff the amount at which the crop was valued, he relieves the lessor from his responsibility to the plaintiff, and he relieves himself from his responsibility to the lessor; and this furnishes a sufficient consideration for his promise to pay the amount of the valuation.

In my opinion, therefore, the verdict should stand.

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#### MACDONAAD V. KETCHUM.

*Evidence—Judgment.*

In an action for money had and received.

*Held*, that an indictment, upon which the defendant had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible as proof of that fact.

The declaration claims £100 for money received by defendant for the use of plaintiff. Plea, never indebted.

The trial took place before *McLean, J.*, in October last, at London. The leading facts were, that the plaintiff and defendant came together to the Bosanquet post-office, on 18th July, 1855—the defendant having a sealed packet, addressed to the Commissioners of the Canada Company at Toronto, with him, on which the word “money” was written. The defendant handed it to the post-master to be posted, and said he wanted it registered, and wished to pay the postage. Some conversation took place between the post-master and defendant as to how many rates of postage should be charged, the former saying that he thought three rates, or 9d., and the latter that it was “standing weight,” and he thought then an extra rate of 3d. was chargeable. The defendant required and received a certificate of the registry of the letter. The postmaster asked him why he had written “money” upon it, as the regulations which had been shewn to witness did not require it, and he replied that other letters seemed to be marked “money” as usual, and so he had marked this “money.” When the conversation was going on about the weight of the letter, the plaintiff observed, there was the price of a farm in it. The letter was sealed when the postmaster received it, and he swore he forwarded it in the same state. About a week afterwards the defendant came to the postmaster, saying he had got a letter from the Canada Company’s office, which he did not know what to make of. He shewed the letter, which stated that no money was in the packet. It was proved that this same packet arrived at the Canada Company’s office sealed, and with no appearance of having been tampered with, that it was opened, but contained no money, though a letter was in it written by defendant, stating that there was a remittance of £89 5s. sent, and that defendant was written to, and informed that such was the case. After this, as was sworn, plaintiff and defendant went together to a justice of the peace, and each of them deposed and swore the money had been sent in the packet. Defendant said he had placed the money in it; that there were sixty bank bills. The plaintiff said distinctly that he saw the money put into the packet: that he saw it sealed and delivered to the postmas-

ter. Both said the packet had been made up at defendant's office, and was carried thence by defendant to the post office. The packet, when received at Canada Company's office, contained documents and papers relative to the land, to pay for which the remittance was said to have been made ; and with these papers in it, the postage on it amounted to three rates, or 9d., but with sixty-two bank bills also inclosed, the postage would have been six rates, or 1s. 6d. The plaintiff then put an exemplified copy of an indictment against the defendant, tried at the Lambton assizes in the autumn of 1856, for stealing £89 5s., the moneys of the plaintiff, on which the jury acquitted the prisoner of the larceny, but convicted him of embezzlement. It was proved that this indictment related to the same sum of money as that, to recover which this action was brought. There was no evidence that any judgement had been given on the verdict of the jury. For the defence, three witnesses spoke to declarations of plaintiff, that he did not believe the defendant had taken his money, and in referring to the making up the packet and carrying it to the post office, he said defendant had not the chance to take it, and he (plaintiff) did not think that he would, if he had had a chance, for he considered him to be an honest man. One of these witnesses, however, said that there was a report current, after the loss of the money from the packet, that plaintiff's house had been robbed of \$400, and that he could not tell to which plaintiff referred when he said he did not believe defendant had taken his money. The jury gave the plaintiff a verdict for £101 12s. 1d.

In Michaelmas Term, *J. Wilson*, Q. C., obtained a rule *nisi* for a new trial, on the law and evidence, and he contended that exemplification of the indictment and of the verdict had been improperly received.

*Becher*, Q. C., in the following term, shewed cause. The indictment was put in evidence to shew defendant did not steal the money. The fact that the plaintiff was a witness on that indictment could not effect its admissibility in evidence for this purpose, no judgement ever having been given.

*DRAPER*, C. J., delivered the judgement of the court.

It appears to me the evidence given at the trial was quit



sufficient to entitle the plaintiff to recover, without the proof of the fact that the indictment had been preferred and the defendant acquitted. The pleadings do not raise any question as to the plaintiff's right to recover being suspended—by reason of the money having been taken under circumstances which would make the taking a felony, and the plaintiff not having done all in his power, or any thing, to prosecute for the offence against public justice. But I think as the question appears to have been raised at the trial, the plaintiff might properly be allowed to shew that the defendant had been acquitted on the charge of larceny, and a verdict of guilty of embezzlement rendered on the same indictment, it was evidence of the fact that the matter had been disposed of before the proper criminal tribunal, though not evidence of the fact, that the defendant had taken or appropriated the plaintiff's money to his own use.

No objection seems to have been taken to the charge, and this rule is not moved on the ground of misdirection, further than that ground is involved in the mere reception of the evidence. There is no difference between the conviction and the acquittal of the party, as to the liability to be sued afterwards in a civil action.

We are all of opinion the rule should be discharged.

The following cases were referred to :—Crosby v. Leng, 12 East., 409 ; Peer v. Humphrey, 2 A. & E., 495 ; Stone v. Marsh, 6 B. & C., 551 ; White v. Spettigue, 13 M. & W., 603 ; Marsh v. Keating, 1 Bing. New Ca., 198.

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#### REGINA EX REL. EVANS V. STARRATT.

*Municipal council*—12 Vic., ch. 81—16 Vic., ch. 181.

Held, that a majority of the whole number forming the provisional municipal council of a county must vote at the election of warden.

Summons in the nature of a *quo warranto*, calling on defendant to appear before this court and shew by what authority he claims to use, exercise, or enjoy, the office of warden of the provisional council of the county of Peel.

The relator's statement sets forth that the defendant usurps the office of warden under pretence of an election held on

the fourth Monday in January, 1858, at the village of Brampton, in the County of Peel. That relator has an interest in the election as a freeholder and voter within the county, and as one of the reeves, constituting the provisional council, and shews the following objections to the election. First, that defendant was elected by six only out of the twelve members of the council, against the will of the other six, and therefore was not elected by a quorum or majority. Second—that of the six members who elected defendant, one was the pretended deputy reeve of Brampton, which village is not entitled to be represented by a deputy reeve, and such deputy reeve was not therefore qualified to vote. Third—that at the meeting at which defendant was so elected, only five members, together with the deputy reeve of Brampton, were present, and that six legally constituted members of the provisional council were absent, not having in fact arrived at the meeting or were met in council.

The defendant appeared at the return of the writ.

The affidavit of the relator set forth that the 4th Monday in January last was appointed for the first meeting of the reeves and deputy reeves of the provisional municipal council of the County of Peel. That 10 o'clock, A. M., was the hour named, and that a few minutes after, relator, reeve of the township of Albion, and the deputy reeve of that township, the reeve and deputy reeve of the township of Toronto, the reeve of the Gore of Toronto, and the reeve of the village of Streetsville, being six members of the provisional council, attended at Brampton at the place appointed for the first meeting, and found no other of the members of the provisional council there. But that immediately after, defendant, the deputy reeve of the township of Chinguacousy, the reeve and deputy reeve of the village of Brampton, the reeve and deputy reeve of the township of Caledon, entered and declared that they had previously met that morning and elected defendant warden, and that defendant declared he had been elected, and took his seat. That there are in all twelve reeves and deputy reeves returned to the said provisional council, including the deputy reeve of Brampton, and that defendant was elected warden by six only, including

the deputy reeve of Brampton, against the will and without the assent of the other six, and at a meeting at which neither one of the other six were present. That the election of the defendant as warden, was made at a meeting of six only, in a hurried and injudicious manner, in order to avoid the presence and opposition of the other six.

*Cameron*, Q. C., appeared for the defendant, and objected that it did not appear that either the relator or the other five alleged members of the provisional municipal council had, in compliance with the 16 Vic., ch. 181, sec. 13, filed their certificates of election, and of having taken the oaths, as reeves and deputy reeves, &c.

*Eccles* relied on the express provisions of the 30th section of the same act.

DRAPER, C. J., delivered the judgment of the court.

It is unnecessary to consider Mr. *Cameron's* objection. The 30th section referred to is submitted for the 168th section of 12 Vic., ch. 81, and is to be read as part of that act. It provides, "that at any session or meeting of any municipal corporation under this act, a majority of the whole number of those who shall by law form such corporation shall be a quorum for the despatch of business." The strict letter of the act, it is true, applies only to municipal councils under the 12 Vic., ch. 81. But I am of opinion that the same rule must govern provisional municipal councils as is established for those not provisional. The 11th sec. of 12 Vic., ch. 78, a statute which we may properly regard as passed in *pari materia*, enacts that every provisional municipal council shall have *all the powers* in, over, and with respect to such junior county *as are now by law vested*, or as hereafter may by law be vested, *in the different municipal councils* in Upper Canada, so far as the same shall or may be requisite for the particular objects there set forth. The 13th section of the same act gives to provisional municipal councils all powers necessary for the purpose of carrying into effect the object of their erection, and none other. The 9th sec. of 14 & 15 Vic., ch. 5, further shews the intention of the legislature to subject all municipalities to the general pro-

visions of 12 Vic. ch. 81. I think therefore that there is ample warrant for saying that the provincial municipal councils having "*all the powers*" as expressed in the 11th sec. 12 Vic., ch. 78, should be held to hold those powers as the municipal councils (not provisional) hold and exercise them, that is by a quorum consisting of a majority of the whole body.

Assuming the deputy reeve of Brampton to have been duly elected, the whole number forming the provisional municipal council is twelve, and therefore more than six must be present to constitute a quorum. The defendants, therefore, was not duly elected, for there was no legal meeting of council for the despatch of business, when his professed election took place. Our judgment must therefore be, that the defendant hath usurped the office of warden of the provisional municipal council of the county of Peel, and that he be removed therefrom, and that the relator recover his costs against the defendant.

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### COATSWORTH V. THE CITY OF TORONTO.

#### *Special contract—Damages.*

Where work to be done (under a special agreement) to the satisfaction of a surveyor, and the jury notwithstanding a certificate of the surveyor was not produced gave a verdict for the plaintiffs. It was set aside.

The declaration sets out articles of agreement under seal, made between plaintiff and defendants, to clean and repair according to the agreement and specifications during three years, commencing on the 1st of April, 1854, Yonge street, from the north side of Queen street, &c., (setting out certain limits) in consideration of which defendants agreed to pay plaintiff each year during the term £1,500, by quarterly payments on the 1st of January, April, July, and October. Averment of general performance, and breach 1st, that on the 1st of January, 1857, £375 became due, which defendants have not paid, and 2nd, that on the 1st of April, 1857, a further sum of \$375 became due, which defendants have not paid. There were also common counts.

Pleas. 1st—That by the said articles it was further agreed,



&c., setting out the particular character and several descriptions of work to be executed, and ending thus: "that the whole of the said work should be done thoroughly and faithfully according to the said specification, and to the entire satisfaction of the chairman of the board of works, or of the officer appointed to superintend the said work." Averments, that one Thomas H. Harrison was the officer appointed to superintend, and one Thomas Booth was duly appointed to assist him. That plaintiff did not well and truly perform the covenants, negating one by one the fulfilment of each article in the specification. That Harrison and Booth on several occasions after notice given to plaintiff, and his neglect, employed men, &c., to clean and repair the streets, and expended money in so doing, which defendants claim to deduct from any money due plaintiff, and generally that plaintiff did not perform the work thoroughly and to the satisfaction of the chairman of the board of works, or of the officer appointed to superintend. The plaintiff traversed the non-performance of each particular, asserting that he did perform, &c. To the other counts the pleas were never indebted, payment and set-off. To the breaches the plaintiff replied specially, that the defendants broke open and excavated the streets in order to make certain works and improvements, and left the earth, &c., lying on the streets for long and unreasonable times, and after the works were done did not replace the necessary earth, &c., and did not remove the residue, thereby causing much slush dirt and filth, and thereby preventing plaintiff from fulfilling his agreement.

At the trial it appeared that Mr. Harrison (mentioned in the plea) gave the plaintiff the certificate necessary to entitle him to receive the quarterly payment due the 1st of October, 1856, but he gave no certificate afterwards. He refused as he said, after the expiration of the contract in consequence of the bad state in which the roads were. On the 13th of October he gave plaintiff a notice that the streets mentioned in his contract required throughout a coating of stone four inches thick, the expence of which he said would have been £3000, but he gave great latitude as to quantity

in this notice, knowing that contractors never do as much as is required of them, meaning apparently that he required more than he expected would be done, or than would satisfy him as he also stated. That at the time the streets were given up (the end of the three years I presume), it would have required £897 10s. to put the streets in proper repair. It was proved that certain portions of the streets which the plaintiff was to keep in repairs, were opened by the defendants, in order to make drains and lay pipes, which occasioned an accumulation of mud and dirt on the surface, and in parts broke up the macadamized metal, where it had become bound together, but the defendants did not object at the trial to the state in which those portions of the streets were left. The plaintiff gave some evidence, and offered generally to prove that in fact the streets were in a good and sufficient state of repairs when given up. On the 1st of April, 1857, it appeared the streets were all covered with snow, the winter had been of a very unfavorable character, much rain having fallen in February, in consequence of which notices were served during that month to scrape and clean the streets.

The learned judge directed for the defendants on the ground that it was not proved (but the contrary) that the work was done according to the specification, and to the entire satisfaction of the chairman of the board of works or the officer appointed to superintend the said works.

In Hilary term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and being contrary to the change and perverse.

*Patterson* shewed cause, citing *Morgan v Birnie*, 9 Bing. 672, and *Milner v. Field*, 5 Exch. 829.

DRAPER, C. J., delivered the judgment of the court.

This case was tried before me on a former occasion. I did not take so strong a view in the defendants' favour, as the learned judge on the last occasion. For the admission of Mr. Harrison, that he had required more to be done by way of repairs, than would have satisfied him, and other evidence as to the state of the roads, induce me to think

that the defence was pushed further than was legitimate, and that it might be left to the jury to say whether, on the whole evidence, the plaintiff had not fairly fulfilled his agreement. But it certainly appears the plaintiff has no claim, and sets none up but what depends on the agreement itself and whatever may be the difficulty in consequence of such a stipulation, he certainly has bound himself to complete his work to the satisfaction of the officer in charge. The contract itself makes his being satisfied necessary, and he withholds a certificate because he is dissatisfied. I think we cannot avoid granting a new trial on payment of costs.

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### SHAW V. THE GRAND TRUNK RAILWAY COMPANY.

#### *Railway Company—Merchandise.*

*Held*, that a railway company is not liable for merchandise carried by a passenger as baggage for which no extra charge was paid.

#### SPECIAL CASE.

The following case was stated for the opinion of the court, without any pleadings, pursuant to the statute :

On or about the sixteenth day of April, in the year of our Lord one thousand eight hundred and fifty-seven, the plaintiff, being a passenger in one of the trains of defendants, bought and paid for the usual ticket from Port Hope to Toronto. He had with him at the time a portmanteau, which he then delivered to the person employed by said company in the capacity of baggage master, for the purpose of being carried from Port Hope to Toronto, which is within said company's limits ; and the said baggage master then gave to the plaintiff the usual cheque as a receipt therefor, which cheque was and is numbered to correspond with a duplicate thereof which said baggage master had attached to said portmanteau of the plaintiff : that the said portmanteau, after it had been placed in one of the defendants' cars, was stolen or lost, and contained therein at the time of such delivery, besides wearing apparel, other articles, that is to say, a quantity of gold pens and pencils, the value whereof is not contested, and for the purpose of this case it is admitted they were articles of merchandise, and were for sale by

the plaintiff: that the company had paid for the wearing apparel, but say they are not liable for the gold pens and pencils so lost.

The question, therefore, for the opinion of the court was, whether upon the facts stated the defendants are liable for the said gold pens and pencils or not.

*Hallinan* appeared for plaintiff.

*Galt* for defendant.

DRAAPER, C. J., delivered the judgment of the court.

I do not see how this case is distinguishable from that of the *Great Northern Railway v. Shepherd*, in appeal, (8 Ex. 30), which decides that a carrier of passengers for hire is only bound at common law to carry their personal baggage, and that if a passenger has merchandize among his personal luggage, or so packed that the carrier has no notice that it is merchandize, he is not responsible for its loss.

The plaintiff was a passenger, paying a fare for his own carriage. He had with him a portmanteau, which was not stated by him, nor had defendants any reason apparent to know, contained any thing but personal baggage, and no extra charge was made for its carriage. It contained articles of merchandize intended for sale. The portmanteau was lost, and the only question raised is the defendants' liability for these articles of merchandize. The two cases are undistinguishable. I fully concur in every word contained as follows, in section 115 of *Angell on Carriers*: "An agreement to carry ordinary baggage may well be implied from the ordinary course of business; but the implication cannot be at all extended beyond such things as the traveller usually has with him as part of his baggage. All articles which it is usual for persons travelling to carry with them, whether from necessity or from convenience or amusement (such as a gun or fishing tackle) fall within the term baggage." The defendants here have paid for every thing but the merchandise, and the case above cited shews that they are not responsible for that.

Judgment for defendants.



## THE QUEEN V. WATSON.

*Criminal appeal—Conviction.*

The defendant was convicted before the mayor of breaking a town by-law, and appealed to the quarter sessions, where the conviction was upheld.

A motion was then made against the indictment in this court, which was brought up by *certiorari*; and the conviction was again upheld.

*Quære*, as to the right of appeal from the quarter sessions.

The defendant had been convicted before the mayor of Sarnia of an offence against a by-law of the municipality, by which, section 11, it was provided, in reference to tavern-keepers, "That they shall not sell any liquor or permit such to be drunk in the bar-room of their house, on any evening after ten o'clock, nor on any part of any Sunday." The information charged the defendant with having, on Sunday, 16th of August, 1857, permitted liquor to be drunk in the bar-room of the tavern kept by him in Sarnia: to wit, did permit one William Adams to drink two glasses of brandy, and did permit Charles Goodall to drink two glasses of beer on the said day and in the said bar-room." The defendant, according to the affidavit sworn by him on moving for the *certiorari*, pleaded guilty to the information, and was convicted, without any evidence having been given, of the offence charged in the information, adding the words, "then and there purchased by the said Charles Goodall at the bar of the said tavern, contrary to the by-law of the town of Sarnia, in that case provided." From this conviction, however, he appealed to the quarter sessions stating as the grounds of appeal, that he was not guilty: that he had paid for his tavern license, but had not yet got it, though he had repeatedly applied for it: that no copy of the by-law was ever furnished to him, nor was it to his knowledge ever published in any newspaper, and that if he had infringed its provisions it had been done in ignorance. At the sessions the conviction was sustained by the verdict of the jury who were sworn to try the appeal.

The conviction was moved into this court by *certiorari*, and *D. B. Read* moved to quash it, contending that the information as set forth did not state any offence against the by-law, and that the conviction was of an offence not charged,

namely, the selling the brandy. He stated, also, that he was instructed that the defendant had not appeared to the information, and was convicted without being heard.

No one appeared to support the conviction.

DRAPER, C. J., delivered the judgment of the court.

I had some doubt, on reading the case of the Victoria Plank Road Company v. Simmons, 15 Q. B. U. C. 303, whether we should entertain this application. But in that case the court merely threw out an intimation that the right to bring the case up again may be questionable, and dismissed the application on other grounds; and as we see no objection whatever on the face of the conviction in point of law, and as we have no doubt the decision of the quarter sessions on the appeal is quite conclusive on the merits, we may refuse *Mr. Read's* application without troubling ourselves to decide the doubt. The cases however of *Rex. v. Moreley* (2 Burr. 1041), *Rex. v. Eaton* (2 T. R. 89), *Rex. v. Spencer* (ib. 196, note), *Cates q. t. v. Knight* (3 T. R. 442), *Rex. v. Jukes* (8 T. R. 542), seem rather to lean to the conclusion that the *certiorari* will lie, though the words of our statute, requiring the defendant to enter into a recognizance, conditioned, among other things, "to abide the judgment of the court, as a condition precedent to the allowance of an appeal to the sessions, are strong, still the *certiorari* is not taken away, and the court say, in *Regina v. Moreley*, "The jurisdiction of this court is not taken away unless there be express words to take it away." We think therefore the appeal should be dismissed, and the record be sent back to the quarter sessions.

### LENNOX v. HARRISON.

#### *Obstruction of Road—Contractor personally liable.*

Defendant having been employed by a Road Company to furnish them with stones, by placing them on the road, accidentally caused the death of plaintiff's servant and horse.

On an application for a nonsuit, it was held that the defendant was personally liable for the damage done, under 16 Vic., c. 190, sec. 49.

DECLARATION states that, on the 10th October, 1857, the defendant wrongfully placed divers large quantities of stone

on the common highway, known as Yonge Street, between a place called Hogg's Hollow and Thornhill, and kept the same there during the day and night, without placing any light or signal near such stones to denote the danger. That plaintiff's servant who was lawfully driving a horse of plaintiff's along the said street, and not having any notice or knowledge of the danger, and without any carelessness or negligence on his part, was precipitated with the horse on the stones: that plaintiff's servant was killed, and plaintiff's horse so cut and injured, that in consequence thereof he died within a week.

*Pleas.*—1st. Not guilty. 2nd. That the stones were placed along the sides of the road for the purpose of being broken up for the repair thereof, by the order of James Beaty, who was the lessee of the road, and whose duty it was to repair the same. That plaintiff's servant might have avoided the injury, if he had used proper care in riding the horse; but he negligently and carelessly rode the horse along the road, and by means of such negligence contributed to the accident and caused the injury. The plaintiff joined issue on the first plea, and traversed each of the facts relied on in the second, on which traverse the defendant joined issue.

At the trial at the last Toronto assizes, before *Burns, J.*, it appeared that the defendant was furnishing stones to the Company who have the Yonge Street road; and it was positively sworn by a superintendent in their employ, that the defendant was told to place the stones either inside his own gate—as his farm adjoins the road on the east side—or else on that part of the road lying between the ditch and the fence, but not to put them on the graded part of the road. But they were placed in a heap, not tossed up, occupying a space about twelve feet broad and twenty-four feet long, very near the macadamized part of the road, and, according to some of the evidence, actually encroaching on it. A man in plaintiff's employ was riding a mare, which was a racer, coming from Thornhill towards Toronto, after dark, on the 17th of October last. The mare was found walking along the road, by a person who had started with

plaintiff's servant from Thornhill, much cut and hurt. She died shortly after. The rider was killed on the heap of stones left by defendant. Plaintiff's witness valued the mare at from £100 to £125. On the defence it was contended, first, that the obligation of the act of 1853 did not apply, because it was not proved that this road was in the hands of a Road Company, and that the defendant is not the person who should be sued, but the parties who employed him. The learned judge overruled both objections, reserving leave to more. Evidence was gone into on the part of the defence, to shew that the mare was unmanageable and beyond the control of the rider, and carelessness on his part; also to diminish her value from that mentioned by plaintiff's witness.

The learned judge left it to the jury to say, whether the stones were placed on the road by authority of the Road Company, or their agent. 2nd. Whether blame was to be attached to the rider or the animal, so as to amount to negligence in the rider; whether, with care and caution, he could have avoided the pile of stones. They found against defendant on both points, and gave £25 damages.

In Michaelmas Term, *Eccles*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence.

*S. M. Jarvis* shewed cause. His argument was mainly founded on the 49th section of the statute 16 Vic., ch. 190, which prohibits Road Companies, formed under the act, or any person acting under them, from leaving any materials so as to obstruct the graded part of the road, and makes the Company, municipality, contractor, sub-contractor, or other person, liable for all damages arising from such offence.

*Eccles*, Q. C., contra, insisted that the statutory provisions did not embrace a person who, from all that appeared, was merely selling stones for the repair of the road to the Company: that the stone was delivered by him for the Company, for their convenience and at their request. He also insisted that, on the merits connected with the immediate accident, the plaintiff did not make a case to recover.

DRAPER, C. J., delivered the judgment of the court.

I think there was sufficient evidence that this was a Road



Company under the statute, having control of this road, to go to the jury, and one branch of the argument for the defence, is founded on the assumption that they were a Road Company, but that the defendant was not one of the classes of persons made liable by the statute for damages. The statute applies to every Road Company, every municipality under whose control the road may be, and to every contractor or sub-contractor, and to every person employed by any of the foregoing bodies or parties. The evidence shewed defendant contracted to deliver stone to the road company, and it went further, for it proved he was directed to place the stone on a part of the road not graded. If the evidence shewed no Road Company, then the question would arise at common law. Undoubtedly placing stones on the road, a public highway, is a nuisance. There is no pretence for saying that the defendant did not place them there. If he acted under such circumstances as to create a relation of master and servant between himself and those for whom the stone was delivered, he would not be responsible. (*Sadler v. Hencock*, 4 E. & B. 570, and cases there cited.) But he was selling stone to other parties, and the evidence of the superintendent in charge of the road shews that he filed the position of a contractor for the delivery of stone. He proves that the parties for whom the stone was being delivered did not direct defendant to place it where it was placed, so as to make the nuisance an act done by their command. But if not, *Reachey v. Rowland* (13 C. B. 182), applies, and on the principle of that case and of the authorities referred to in it, the defendant is liable. As to the merits, they went fairly to the jury; there is no ground for differing from these conclusions.

Rule discharged.

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#### BUSH V. ABEL.

##### *Agreement—Mutuality.*

The plaintiff entered into an agreement with defendant's wife. That defendant with whom he had left some promissory notes for collection, should maintain him free of charge for the remainder of his life, and have his estate and effects upon his decease. Upon an action brought for money had and received, the learned judge ruled that there was no mutuality, as the defendant could not have been bound to maintain the plaintiff. The jury having found for the plaintiff, the court upheld the verdict.

This was an action for money had and received. The

first count being on a special agreement to collect certain promissory notes for plaintiff. The pleas were, 1st—a denial of the agreement; 2nd—never indebted; 3rd—set-off; 4th—on equitable grounds, set up an agreement that plaintiff should give the defendant the promissory notes mentioned in the first count. That defendant should collect them and apply the proceeds to his own use, and in consideration thereof should keep plaintiff for the remainder of his life without charge. That defendant has hitherto kept the agreement, and is still willing to do so.

At the trial at Berlin in November last before *Burns, J.*, it appeared that defendant had admitted in July last he had collected \$481 29½. of plaintiff's money. The witness said he went to defendant to try and make a settlement for plaintiff, and that defendant said he had a large account against plaintiff amounting to \$294; \$130 of this was for extra liquor, at \$1 per week, \$42½ for washing, and some charges for clothes, &c. The witness refused to settle on these terms. The defendant said, he thought plaintiff would live with him all his life, and that he should have the money; for that defendant is a tavern-keeper, and plaintiff lived with him upwards of three years. It was proved that plaintiff was addicted to drinking. He worked in defendant's garden, watered horses, &c., for defendant, and it was said he was able to do work enough to earn his board. On the defence it was proved that three years before the plaintiff had agreed with defendant's wife that she was to take care of and keep plaintiff as long as he lived, and was to have his property at his death. That he lived and was maintained, and got clothing, nursing, and medical attendance at defendant's expense for two and a-half years, and occasionally some money. The witness swore the understanding was, plaintiff was to work for his liquor and washing, and his money to go to his board and clothes; he was to have three glasses of liquor daily, but he got more, once he got sixteen glasses extra. Plaintiff's admissions were proved to the effect that defendant was to keep him as long as he lived, and he was to give what he had.

The learned judge held that even if the plaintiff did make

such an agreement it was not mutual; that if defendant died, it did not appear his estate would be bound by the agreement, and he directed the jury that the plaintiff was entitled to recover back his money after deducting what they should consider justly due to the defendant, and that the facts were sufficient to raise a promise to repay the money collected by defendant on request. The jury found for the plaintiff, £72 10s.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection in laying down the law as above stated, and for excessive damages, not having allowed defendant a sufficient set-off according to the evidence.

In Hillary Term, *Eccles*, Q. C., shewed cause, and *M. C. Cameron* supported his rule, no authorities were cited.

DRAPER, C. J., delivered the judgment of the court.

There can be no doubt that the plaintiff is entitled to recover as for money had and received, unless the facts stated in the fourth plea being proved are sufficient to bar the recovery. For the defendant admits he has received a considerable sum of plaintiff's money, against which he advances an account, not denying his accountability, but simply stating that he thought the plaintiff would live with him all his life, and he should have the amount of the money for that. He asserted no agreement at that time. But on the defence a witness proved that she heard an agreement made between defendant's wife and the plaintiff, that she was to keep him as long as he lived, and have his property at his death. That he was to work for his liquor and washing, and his money to go to his board and his clothes. In the first place it is not shewn that the defendant's wife had any authority to bind him by this agreement, and the defendant advancing an account against the plaintiff for washing and clothes, as well as for extra liquor, affords evidence which, with his own statement, is strong to shew he had not adopted the agreement so made. In the second, the agreement so proved is not that pleaded, for the plea is, that the defendant was to apply the plaintiff's moneys to his (defendant's) own use,

and in consideration thereof should keep plaintiff for the remainder of his life free of charge. The admission of agreement made by the plaintiff as proved was, that he had arranged with defendant to keep him as long as he lived, and he was to give what he had, an admission not consistent with the defendant's conduct, or the proof given on the defence of the actual agreement, though it goes further to support the plea than any other part of the evidence.

The learned judge, while telling the jury that even if they found the plaintiff made such an agreement as was pleaded, said he should not recommend them to disallow the claim, because the agreement proved being with defendant's wife, was not mutual, not binding on the defendant's estate, or even it may be added on himself, without ratification. He left them to say whether they found the agreement to have been made. The verdict however, being general, we may suppose they have determined the question (whether such agreement as is pleaded was actually made between plaintiff and defendant or not) unfavourably to the defendant, and need not enquire whether, assuming such an agreement to have been made between plaintiff and defendant, the plaintiff could have rescinded it of his own will, and bring assumpsit to recover back his money.

Treating the verdict as negating the equitable plea, I see no reason for granting a new trial.

Rule discharged.

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CAMERON V. KNAPP ET AL.

*Mortgage—Forfeiture—Payment.*

The plaintiff held defendant's mortgage with a condition of forfeiture that the whole principal should become payable if the interest was unpaid for 10 days after it became due. By agreement between them plaintiff drew on defendant for the interest (at three days' sight) a few days before it became due, which draft was discounted by plaintiff at his bank, and the proceeds placed to his credit prior to the expiration of the ten days limited for the forfeiture, and was afterwards accepted by defendant; but upon maturity was dishonoured, and charged back to plaintiff's account in the bank. The defendant contended that the interest having been received by the plaintiff (by the discount) before the 10 days expired forfeiture could not be claimed.

*Held*, that it was in fact no payment, and that the whole amount of the mortgage was due.

The declaration stated that the defendants by a mortgage dated the 29th of August, 1855, covenanted to pay plaintiff



£2,990 in five years from date, with interest quarterly, on the first of January, April, July and October, and in case of default of payment of interest within ten days after any of the days on which the same was payable to pay immediately the whole principal. That defendants did not pay the interest which fell due on the first of October, 1857, nor within ten days thereafter, whereupon the said sum of £2990 became payable.

Pleas, 1st—*Non est factum*. 2nd—As to £2,990 parcel, &c., that the quarter's interest in the declaration mentioned was not in default for ten days after the first day of October, 1857, nor is it now in default. The third plea was special and the replication was demurred to. Judgment was given for the plaintiff on the demurrer.

The issues were brought down to trial at the last Toronto assizes before *Burns, J.*, when a verdict was taken by consent for the plaintiff for £44 17s. 6d., with leave reserved to him to move to have said verdict increased by the amount of forfeiture claimed in the declaration on the following statement of facts. That the plaintiff drew on the defendants under date of 26th of September, 1857, pursuant to an arrangement between them for £44 17s. 6d., being the quarter's interest falling due 1st of October, 1857, at three days' sight in favour of C. J. Campbell, manager of the Commercial Bank, Toronto, or order, who for the bank cashed the same for plaintiff. That it was by him endorsed to J. G. Harper, agent at London, and by him to Thomas McCrae, agent at Chatham. That it was presented for acceptance and accepted on the 17th of October, protested for non-payment, 23rd of October, returned by Chatham agent to Toronto office 29th October, and then charged against plaintiff's cash credit account. That in the ordinary course that account would be balanced and closed half-yearly on the 25th of November, and the 25th of May, when whatever amount appeared to have been drawn by or charged against plaintiff would have to be paid in cash. That accordingly on the 25th of November last, the account was closed and balanced and a certain amount found to plaintiff's debit composed of various items, among others the draft in

question. That for said amount so at plaintiff's debit he assigned to the said bank on collection, and by way of security, various securities still held and in course of collection, but that the said draft was paid as aforesaid by, and given up to the plaintiff. It is further admitted that on the 31st of October Knapp, one of the defendants, transmitted from Toronto to the agent of the Commercial Bank at Chatham, £50, to take up the aforesaid draft, thinking it was still there, that the Chatham agent out of the £50 applied enough to buy a bank draft sufficient to cover the acceptance except the protest, which he had forgotten, and sent the same in a letter to Knapp in Toronto, but Knapp did not receive or know of it until his return to Chatham, when he wrote to his agent in Toronto, T G. Hurd, on the 9th of November, to go to the Toronto post office for the letter, and to settle the acceptance with plaintiff. That on or about the 10th November Hurd got the letter and draft, and went to plaintiff and offered to pay the acceptance, but plaintiff refused to accept payment, stating that he had agreed to assign the mortgage to the Commercial Bank, which he did on the 17th November last, and saying further that any application must be made to the bank, to whom, however, he thought it would be useless to apply. That Hurd afterwards did apply to the bank manager at Toronto, and was refused.

In Hilary Term, *Cameron*, Q. C., obtained a rule *nisi* to increase the verdict pursuant to leave reserved.

*Hurd* shewed cause. He cited *Hodgson v. Anderson*, 5 D. & R. 735; see also 3 B & C. 842; *Bunney v. Poyntz*, 4 B. & Ad. 568; *Ex. parte Loring*, 2 Rose, 79; same case, see *Pooley v. Goodwin*, 4 A. & E. 94.

DRAPER, C. J., delivered the judgment of the court.

For the defendants it has been urged first, that, inasmuch as the bill of exchange was drawn in favour of a third party who discounted it for, and gave the proceeds to the plaintiff, the quarter's interest due on the 1st of October was paid, and therefore there was no default, and so the second plea was proved, and *Bunney v. Poyntz* was cited as affording an analogy, by which we might so hold; and secondly, that the

plaintiff had waived the forfeiture by taking the bill of exchange for the interest, and by its not being presented or dishonoured until after the expiration of the ten days from the first of October, and theretore, there was no default, and the second plea was proved, and it was urged generally that forfeitures were not favourably viewed by the court, who would lean against them wherever the facts permitted. As to the first point, if the plaintiff had not been obliged to take back the bill of exchange and pay the amount of it to the holder, being himself the drawer of it, the case would more substantially resemble that of *Bunney v. Poyntz*. But though the plaintiff did receive the money before the interest became due, it could not be deemed a payment to him until it was honoured by the defendants. It was no more a payment to the plaintiff of the interest, than if the payee of the bill had advanced so much money, on receiving an assignment of the particular payment, with a covenant or undertaking by plaintiff to repay it if defendants made default. It was a mere advance of money in part upon the plaintiff's own credit, and therefore no payment to him.

As to the second point, there is nothing in the contract between the parties, that upon default in payment of the interest for ten days after it should fall due, the principal should become immediately payable, which the court can pronounce to be illegal and unreasonable or repugnant to the general tenor of the agreement. It is perhaps rather a forced analogy, which is set up between this case and that of a forfeiture of a lease. But, assuming the analogy to be perfect, we are reduced to the enquiry whether the forfeiture was incurred, the question whether it was waived does not arise upon these pleadings. From the fact that the bill was to be, and was drawn on the 26th of September (five days before the interest was payable) at three days' sight, we may assume fairly that it was in the contemplation of the parties, that it should fall due and be paid before the ten days expired. Then comes the fact, that it was not presented till the ten days had expired. If it had been duly honoured, then paid at maturity after the actual acceptance, a very different question would have arisen. But it has

never been paid at all, and the offer to pay was many days after the dishonour, so that the defendants neither fulfilled the covenants in the mortgage, nor yet the agreement which they allege was substituted for it. If the plaintiff were endeavouring to enforce the payment of the principal before the bill drawn in pursuance of the agreement was dishonoured, an equitable, if not a legal defence might have arisen. But here the defendants are setting up an unperformed parol agreement, made before breach in discharge of a subsequent breach of covenant under seal.

I think the rule should be made absolute.

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THE MUNICIPAL COUNCIL OF SOUTH EASTHOPE v. HELMER ET AL.

*Taxes—Collector.*

In an action against the principal and sureties on a collector's bond. *Held*, that the admissions of the principal are evidence against himself. *Quære* as to the sureties, *Ferrie v. Jones*, 8 U. C. Q. B. 192.

DECLARATION set forth a bond, dated        day of November, 1855, whereby defendants became bound to plaintiffs in £1000, conditioned that if John Helmer should faithfully and truly fulfil the office and duty of collector of the township of South Easthope, for the year 1855, and until the term of the office should expire; and should truly receive all moneys, &c., and pay over the same to the treasurer of the said township, and render a just and true account when required, and comply with the by-laws as to collectors.

Averment, that John Helmer, as such collector, collected and received £200, yet he did not pay over the same, or any part thereof, but hath wrongfully misappropriated the same, and hath not rendered a just and true account of the same, though requested by the treasurer to do so at the expiration of his term of office; and hath not faithfully or truly fulfilled the office or duty of such collector as aforesaid.

*Pleas.*—1st. That John Helmer, as such collector, did not collect or receive any moneys. 2nd. That John Helmer did duly account for and pay over to the treasurer all moneys by him collected, as such collector.



It was proved at the trial (at the fall assiezs at Stratford, before *Burns, J.*.) that the roll shewed a sum of £800 9s. 4½d., as to the taxes collected in the township of South Easthope, for the year 1855, and that the collector Helmer had accounted for £668 6s. 4d., up to the 17th January, 1857, and there were to be reductions made from the roll to the amount of £33 5s. The treasurer and John Helmer, in January, 1857, struck the balance due to the township on the roll at £99, and John Helmer then paid £33 10s. more, neither admitting or denying whether he had collected the residue or any part of it. About the same time Andrew Helmer, one of the sureties, being spoken to about the amount unpaid, told the township clerk that if about £7 were deducted in respect of some property in the village of Shakespeare, the remainder would be shortly paid up by the collector and sureties. Upon this evidence which was left to the jury as sufficient to warrant their finding that the residue of the £99 had been collected by the collector, they gave a verdict for plaintiff for £65 10s.

In Michaelmas Term, *C. Robinson* obtained a rule *nisi* for a new trial, on the law and evidence, because no sufficient evidence was given to warrant the finding that the money had been received by John Helmer, and for misdirection in ruling that there was sufficient evidence to go to the jury on this point. He moved also, on affidavits, complaining that the plaintiff's council had urged to the jury, as a ground for finding against defendants, that the collector had been guilty of great negligence in the discharge of his duties, which improperly influenced the jury; and shewing that, owing to the late period at which the township council had fixed the rate, and for other causes, the collector's roll was not made out and delivered to the defendant, John Helmer, until the 15th December, 1855; and the collector himself swears that, up to the present time, he has been unable to collect the residue of the taxes, and has not received any part of the money for which the verdict has been rendered; that he has sued several parties for their respective taxes, and, as yet, without effect.

In the following term, *Eccles, Q., C.*, spoke to the rule for plaintiffs.

*C. Robinson* argued that the only evidence of the receipt of the money, was by inference from what the collector himself had said, in the absence of the sureties, and that any admission made by him would not be evidence against them. He cited *Ferrie v. Jones*, (8 U. C. Q. B. 193) and *Taylor's Evidence*, S. 710.

DRAPER, C. J., delivered the judgment of the court.

Apart from the legal question raised by *Mr. Robinson*, I am disposed to grant a new trial, on the grounds disclosed in the affidavits, which are not answered. The roll was not given to the collector until within a fortnight of the end of the year 1855. He swears he has paid over all he has received and that parties whom he is suing for there taxes defend their suits, contending they are not liable because the taxes were not demanded within that year. And I am also influenced by the consideration that the evidence of the receipt of the money by the collector was of the very slightest description. As to the legal question, I continue of the opinion expressed by me in *Ferrie v. Jones*; but there is a distinction between that and the present case, which has not been referred to. There the action was against a surety only. In the present case the principal and sureties are sued as joint obligors. The admissions of the principal as against himself are clearly evidence, and it may be strongly argued that, whatever is evidence against him, will also be receivable against his co-defendants, in an action on their joint obligation.

Rule absolute for a new trial.

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### McCALLUM V. HUTCHISON AND ANOTHER.

#### *Nuisance—Landlord—Tenant.*

*Held*, that the landlord and tenant were both liable for damages, arising from a nuisance erected by the landlord in the house, and continued to be used by the tenant while occupying it.

CASE for a nuisance, charging that *defendants were possessed of a building*, adjoining plaintiff's shop and dwelling house, and separated therefrom by a party wall: that defendant, *Hutchison*, having constructed in this building a

water-closet in a careless and improper manner, the defendants so negligently and improperly continued and used the same, that the party wall was wet, and the water from the water closet penetrated through the wall into plaintiff's house, and also the water and filth from the water-closet flowed into the cellar of plaintiff's house, and made the cellar wet and dirty, and created therein offensive stench.

Pleas, not guilty.

The case was tried at the last Toronto assizes, before *Burns, J.* It appeared that the defendant Hutchison is landlord and the defendant Matthews tenant in possession of the building from which the nuisance proceeds. There is a gateway between the two tenements, and a room over the gateway, belonging to the defendant's tenant. In this the defendant Hutchison, before the demise to Matthews, constructed a water-closet, next to the party wall, and cut away nine inches of that wall, down and by one side of the gateway, to admit the pipes to pass. There is a soil pipe and a water or service pipe, which lets the water up from the water works pipes. This latter, by frost and other causes (gnawing by rats was mentioned) has, since Matthews became tenant, leaked, and the water has soaked through the party wall, to plaintiff's injury. The soil pipe seems to have been all right, though there was evidence to shew noisome smells in the cellar; but evidence was also given which led to the inference that there were other causes for that nuisance. It was objected that the landlord was not liable under the circumstances, and leave was reserved to move to enter a verdict for him, subject to which the jury found against both defendants.

In Hilary Term, *M. C. Cameron* obtained a rule *nisi* accordingly. He cited no authority.

*Patterson*, contra, cited *Rex v. Pedley*, 1 A. & E. 822; *Rex v. Moore*, 3 B. & Ad. 184; *Russell v. Shenton*, 3 Q. B. 449; *Rich v. Basterfield*, 4 C. B. 783; *Thompson v. Gibson*, 7 M. & W. 456; *Alston v. Grant*, 3 E. & B. 128.

DRAPER, C. J., delivered the judgment of the court.

The only question for our decision is, whether a verdict

should be entered for the defendant Hutchison. It is clear that he erected the water-closet, and if as erected it was a nuisance, or was improperly constructed in the first instance, so that it could not be used without creating a nuisance, there are authorities to shew that he might be held liable, notwithstanding his having let the premises to the other defendant. But on these pleadings it appears to me that question does not properly arise. The declaration charges that the defendants were possessed of the building in which Hutchison had erected the water-closet in an improper manner, and that the defendants negligently, carelessly and improperly continued and used the same, to the plaintiff's damage. Now there is no plea traversing the possession of the two defendants or either of them. The plea of not guilty denies only the wrongful act, *i. e.*, the continuing and using the water-closet, to plaintiff's damage, and the possession of the premises by both defendants being admitted, both are responsible for the wrongful act proved. I think, therefore, that the rule must be discharged.

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### CARROLL V. LUNN.

#### *Replevin—Seizure.*

The plaintiff claimed a horse, the subject matter in dispute, as having purchased it. The defendant claimed under a sale upon a Division Court execution, which it appeared had not been regularly renewed from month to month.

*Held*, that the execution not having been kept regularly in force the sale in the interval cut it out, and that the plaintiff was entitled to recover.

REPLEVIN for a mare, value £25. Pleas. 1st—*Non cepit*. 2nd—Did not detain. 3rd—Goods not plaintiffs, and prays a return.

The trial took place in November last at Stratford, before *Burns, J.* The plaintiff proved by two witnesses that he had purchased this mare in 1856, from one Lucas. One witness said it was in March, and the other in July, 1856, and that she strayed away two or three months after he got her. And ten months or so after she was lost, plaintiff heard of her being in Stratford, and finding her in defendant's possession, brought this action of replevin, as defen-



dant stated he had bought and paid for her, and would not give her up. On the defence it was proved that the mare had belonged to one Thomas Gallagher; that about June, 1856, she strayed to the premises of one Sargent, in North Easthope, who caused advertisements to be inserted in a Stratford and Sarnia paper. The plaintiff hearing of this wrote on the 30th of December, 1856, acknowledging the receipt of a letter from Sargent, and requesting him to keep the mare a little longer, as he could not immediately come for her. Gallagher left Stratford or its neighbourhood in April, 1856, and, as was supposed, took the mare away with him. Before he left, but after the 11th March, a bailiff of the first division court, for the County of Perth, having in his hands an execution at the suit of one Harrison for £7 5s. 8d., debt and costs, levied upon the mare, but left her in the hands of Gallagher after the levy, and he went off, taking the mare as already stated. The bailiff got no account of her until December, 1856, when he got her into his hands, paying Sargent his charges, and sold her (the first execution from the division court having, as he swore, been renewed from month to month, and nearly all these executions, including the first, and that for which the sale was made being produced) to one Shannon, who sold her to defendant. The bailiff said he trusted to Gallagher, that the debt would be paid in a day or two, and therefore took no receipt for the mare. The learned judge asked the jury to say, was this mare seized by the bailiff under the execution dated the 11th of March, 1856, and while she was in Gallagher's possession, and was she then Gallagher's property. They found in the affirmative, and he then directed a verdict to be entered for defendant, reserving leave to plaintiff to move to enter a verdict in his favour.

*Eccles*, Q. C., in Michaelmas Term, obtained a rule *nisi* for a new trial on the law and evidence, or to enter a verdict on the leave reserved.

The following Term, *C. Robinson* shewed cause. He referred to the statute 13 & 14 Vic. ch. 53: sec. 97; 18 Vic. ch. 125, sec. 1, and cited *Lossing v. Jennings*, 9 U. C. Q. B., 406, and the American note to *Harding v. Hall*, 10 M. & W. 57.

DRAPER, C. J., delivered the judgment of the court.

I suppose it was assumed, that the plaintiff had sufficiently established his right to the mare, as a purchaser, unless the sale under the execution against Gallagher was effectual to defeat him. The leave to enter a verdict for the plaintiff involves this admission or assumption. It is necessary therefore to prove a seizure under an execution against Gallagher, and a continuous subjection of the property so seized to be sold, in order to sustain the defence.—13 & 14 Vic. ch. 53, sec. 60.

The bailiff proved the seizure during the currency of the precept to levy, which is dated the 11th of March, 1856, though he omitted to endorse the date of the seizure on the precept, and did not as the statute requires, “immediately give public notice by advertisement” of the time of sale. No such notice appears to have been given. The thirty days during which the writ of execution was in force expired on the 10th of April, 1856. The succeeding writ is dated on the 12th of April. As against Gallagher, while the first execution was in force, the seizure would prevent the selling the property according to *Lossing v. Jennings*, cited by *Mr. Robinson*, but if the goods remained in his hands, as proved after the first writ expired, and while no writ was current against them, it would, as appears to me, be difficult to hold that a *bona fide* purchaser could be deprived of them by force of an execution, issued after the expiration of the first, and on which no seizure was made. Moreover, the bailiff appears to have left the goods in the hands of Gallagher without requiring either acknowledgment or security, on an understanding that the debt would be arranged in a day or two, on which it appears to me the bailiff relied. In the meantime the plaintiff purchased, as appears, for value, and without any knowledge of Gallagher in the transaction, and possibly after the first writ had expired. And although the bailiff swears the executions were renewed from month to month, on looking at them, it is plain there was a greater interval than 30 days between several. One is dated the 13th June, the next the 18th July, the next the 11th August, the next the 22nd September, the next the 28th of October, and

the one on which the bailiff professed to act in selling is dated the 1st December, 1856. I think under these facts the plaintiff ought to be preferred, and that the rule should be made absolute to enter a verdict for him.

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MONTGOMERY V. DEAN.

*Rule nisi—Misdirection.*

*Held*, that the words "on the ground of misdirection," in a rule *nisi* for a new trial, do not comply with the Common Law Procedure Act of 1856, sec. 168.

The declaration set forth a deed, dated 26th August, 1851, whereby plaintiff let to defendant 80 acres of the easterly part of No. 12, 2nd concession east of Hurontario street, in the township of Toronto, to hold for the term of six years, from 1st April, 1851, and defendants' covenanted with plaintiff that they would well and sustantially keep in good repair the demised premises with their appurtenances, and yield up to plaintiff the same in good and lawful repair, and would not let the premises without plaintiff's consent in writing, and would preserve all young oaks and saplings growing on the premises, and would not commit any manner of waste.

BREACHES.—1st. That defendants did not well and substantially keep the premises in repair. 2nd. And did not leave the premises in good and lawful repair and condition. 3rd. And let the premises without plaintiff's consent in writing. 4th. And did not preserve the young saplings and oaks. 5th And did commit waste, in this that they cut down and converted to their own use large quantities of timber and trees, &c.

The defendants pleaded in denial of each of the breaches of the covenant set forth in the declaration.

The case was tried at the last Toronto assizes, before *Burns, J.* It appeared that the buildings on the premises demised consisted of a log barn, log stable and log house, and a milk house. There was very contradictory evidence as to the state of repair of the premises when defendants entered. The plaintiff's witnesses, however, stated the very

bad condition in which the buildings and fences were at the expiration of the term ; to which it was replied, on the part of the defence, that they had rotted from age and from exposure before the defendants got possession, and that the repairs had been done which made the premises as good or better than when defendants entered. As to the cutting of wood, the plaintiff proved that 300 or 400 trees had apparently been cut, and in a manner to be injurious to the property ; to which it was answered that some trees had been cut by a party to whom plaintiff had given permission, and that defendants had cut only necessary fuel and some trees and poles for repairs, but had neither sold nor carried any away.

The learned judge called the attention of the jury to the different pleas, and left them to say whether the plaintiff had made a case for damages, and whether it was met by the defence. They found a verdict for defendant.

In Hilary Term, *Blevins* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection.

*Eccles*, Q. C., shewed cause. He took an objection to the rule, that it did not shew what was the misdirection complained of, and, on the merits, argued that the verdict was right. He cited no authority.

*Blevins*, contra, cited *Burdett v. Withers*, 7 A. & E. 137 ; *Mantz v. Goring*, 4 Bing. N. C. 451 ; *Gutteridge v. Munyard*, 7 C. & P. 129 ; *Woodfall*, 438 ; *Stanley v. Towgood*, 3 Bing. N. C. 4. And after commenting on the evidence given by plaintiff, observed that no answer had been given to the breach for letting the premises without plaintiff's consent, which, though not proved as part of plaintiff's case, came out on the defence, from a witness who stated he went into possession and paid four years' rent, from 1st April, 1853. As to the rule, he said the objection to the judges' charge was stated to the court on moving the rule.

DRAPER, C. J., delivered the judgment of the court.

It would be difficult to say, after reading the evidence on both sides, that the jury have not on the whole come to a right conclusion, and but for the complaint of misdirection,



we should most probably have refused a rule *nisi*. But the case of *Payne v. Hayne* (16 M. & W. 541), appeared to us from the statement made of the charge of the learned judge, to be in plaintiff's favor. It is now objected that the rule does not disclose the objection. It asks for a new trial, "on the grounds that the verdict is contrary to law and evidence, and the charge," "and on the ground of misdirection in the learned judge before whom the case was tried, and on the ground on the reception of improper evidence," On this point the Court Exchequer held in *Watson v. Lane* (2 Jur. N. S. 119), that a statement in the rule "that the judge's direction to the jury, that the plaintiff was entitled only to nominal damages, was wrong," sufficiently complied with the act. In *Drayson v. Andrews* (10 Exch. 472), the same Court held that a rule *nisi* for a new trial, "on the grounds set forth in the affidavits annexed," was insufficient, though they allowed an amendment.

I think the nature of the misdirection complained of should be generally stated in the rule, with sufficient certainty to shew that the point was taken at the trial, without which a new trial would not be granted on the objection (*Moorish v. Murrey*, 13 M. & W. 52; *Hardman v. Belhouse*, 9 M. & W. 595; *Hazeldine v. Grove*, 3 Q. B. 997, and many other cases. *Manners v. Boulton*, 5 Old Series, 663), and therefore, that the objection should prevail; the mere statement, "on the ground of misdirection," not being a compliance with the 168th section of the C. L. P. Act of 1856. And though we might have permitted an amendment, yet it was not asked for, and besides it does not appear that the objection was taken at the trial.

As, therefore, we see no sufficient reason to disturb the verdict on the facts, and ought not to entertain the objection of misdirection, we must discharge the rule.

Rule discharged.

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## GUNN v. RUTTAN, SHERIFF.

*Assignment,—Inventory.*

The defendant seized (under an execution against McL. and F.) goods claimed by the plaintiff under an assignment, duly registered in the county court office of Northumberland and Durham—which had a schedule of goods attached intended to be passed thereby. The goods seized had gone into the store prior to the execution of the assignment, and were not contained in the schedule. The seizure took place in February, and the plaintiff did not take possession till May. One of the assignors, however, swore he was in possession as agent under the assignment, from the time of its execution till May. The jury found for the plaintiff. On a motion to enter a nonsuit.

*Held*, that the assignment only passed what was contained in the inventory, and that the rule for a nonsuit should be made absolute.

*TRESPASS de bonis asportatis.*

*Pleas*.—1st. Not guilty. 2nd. Goods not plaintiff's.

At the trial before *Richards, J.*, at the fall assizes at Cobourg, the plaintiff proved the seizure and sale of the goods sued for, by the defendant, under a writ of *fi. fa.*, received 7th February, 1857. The sale took place on the 16th May following. the cost price of those goods was sworn to have been (including an addition of 10 per cent. for charges) £70 1s. 5d. They were sold for £41 10s. 3d. The execution was against one John McLeod and his partner Fraser.

The plaintiff's title of these goods was by an indenture, dated 1st November, 1856, made between John McLeod, of the town of Cobourg, merchant, of the first part, and Samuel Gunn (the plaintiff), one of the partners in the firm of Bryce, McMurrich & Co., of Toronto, wholesale merchants, of the second part. It recited that John McLeod was indebted Bryce, McMurrich & Co., as well as the firm of Henderson & Brother, wholesale merchants, at Toronto, in large sums of money, and had agreed to assign all his goods, &c., and household furniture and book debts to the now plaintiff, as security for the payment of all moneys then due the said respective firm as for further advances, and witnessed that John McLeod, in consideration of £1978 3s., due to Bryce, McMurrich & Co., and of £1100 11s. 6d., due to Henderson & Brother, bargains, sells and assigns to plaintiff, his executors, &c., all the good, &c., and book debts mentioned in the schedules A and B, thereto annexed. *Ha-*

*bendum* to plaintiff, his executors, &c., upon trust, that is to say, that the plaintiff, his executors, &c., has full power and authority to enter upon the premises belonging to the said John McLeod, as mentioned in schedule A, (the store and premises of said John McLeod, on the south side of King street, in the town of Cobourg) and to take possession of the said goods, &c., or any other goods and chattels that may belong to the said John McLeod; and to sell and dispose of the same, as well to collect all debts and accounts mentined in schedule B; and out of the proceeds of sales and collections, to pay the firms of Bryce, McMurrich & Co., and Henderson & Brother their respective debts, and all expenses incurred in such sales and collections, and next to pay the other creditors of John McLeod the surplus, according to their respective amounts. John McLeod appoints the plaintiff his attorney, to collect debts and to give discharges, and covenants among other things, if the sales and collections do not pay Bryce, McMurrich & Co. and Henderson & Brother in full to pay them the balanc with interest. Other clauses distinctly shew the sole object was to pay these two firms in full in priority to all other creditors. There was an affidavit of the execution of this instrument by John McLeod, sworn by the subscribing witness on the 1st November, 1856, and of his execution by plaintiff, sworn on 6th of the same month, on which day the plaintiff made affidavit, that John McLeod was indebted to him and his co-partners (naming them, but not stating they constitute the firm of Bryce, EcMurrich & Co.) in the sum of £1978 3s., and to Alexander Henderson and John Henderson, carrying on business under the firm of Henderson & Brother, in the sum of £1100 11 s. 6d. That the assignment was executed in good faith, and for the express purpose of securing payment of the sums so due, and not for the purpose of protecting them against the creditors of John McLeod. This instrument was filed in the office of the county clerk, at Cobourg, on the 25th November, 1856. McLeod's sign continued up over the shop, and he continued conducting the business, selling the goods under the assignment; but it did not appear that there were any accounts rendered

against customers in the name of the plaintiff. Goods were afterwards furnished by Bryce, McMurrich & Co., invoiced to the estate of McLeod. It appeared that the plaintiff did not enter and take possession until May, but McLeod swore that he acted from the date of the assignment, and before, as agent for the plaintiff in selling the goods, and accounted to him for the proceeds. He admitted he had paid a judgment recovered against him by one Jones, in June or July, 1857, partly by goods out of the store, though he qualified this by saying there was an understanding that he would protect Jones against being called on to pay for the goods he got. The note on which Jones recovered against him was given before the assignment was made. He said if the business turned out well, he was to have the benefit of it. Part of the goods seized and sold by defendant were not included in the schedule A attached to the assignment, but were bought from Bryce, McMurrich & Co. after stock had been taken by John McLeod, in September, and before the execution of the assignment. Schedule A was a copy from the stock-book, as made up in September. It was sworn the price of the goods bought after September and before 1st November was included in the sum mentioned as the debt due Bryce, McMurrich & Co., and as their part of the consideration for the assignment. Goods were returned by McLeod to Bryce, McMurrich & Co., which reduced their debt to £1100.

The defendant's counsel took several exceptions, on which leave was reserved to move for a nonsuit. The learned judge left it to the jury to say, whether the assignment was *bona fide* in its inception; that to make it fraudulent there must be an existing debt due some creditor at the time of its execution, who might be defrauded by it; that a liability to the holder of a note indorsed by John McLeod was not such a debt. He asked the jury further to determine if the parties to the assignment intended that the goods in John McLeod's store, not included in the schedule, should pass. The jury found for plaintiff £56 13s. 3d.

In Michaelmas Term, *S. Richards* obtained a nule *nisi* for a new trial, or to enter a nonsuit on the leave reserved :



1st, because the assignment did not pass goods not mentioned in the schedule. 2nd, that the assignment was void for want of a proper affidavit of indebtedness, there being no affidavit of debt by plaintiff's co-partners, nor by Henderson & Brother. That if the assignment was held to be an absolute bill of sale, there is no sufficient affidavit by plaintiff as bargainee. That the assignment should have been filed earlier than the 25th November. That it was a misdirection to ask the jury what the parties intended by the assignment, as the construction of the instrument was a matter of law.

In Hilary Term, *Galt* shewed cause. He distinguished this case from that of *Wood v. Rowcliffe* (6 Exch. 407), because here there was a distinct power to take possession of the goods not included in the schedule. He insisted that it was sufficient for one of the partners in a firm to make the affidavit, otherwise no instrument could be filed to secure a co-partnership, where one partner resided in a foreign country, or in England. He contended when the assignment was in trust, the affidavit of the trustee would be sufficient.

*Richards*, contra, referred to *Holmes v. Vancamp* (10 U. C. Q. B. 510), as shewing it necessary that the mortgagee himself must make the assignment, and that here it was made by one that was not privy to one of the debts secured by the assignment, which he contended was in effect a mortgage. He also insisted nothing passed but what was included in the schedule, and that as the possession continued in McLeod from the 1st to the 25th November, during which time the assignment was not filed, the statute was not complied with, which requires an immediate change of possession, unless the instrument be at once filed, 12 Vic., ch. 74, 13 & 24 Vic., ch. 62.

DRAPER, C. J., delivered the judgment of the court.

If I rightly understand the learned judge's notes of the evidence, a portion of the goods seized in the execution by the defendant, were included in the schedule A, and the residue were a part of the goods sold to McLeod, before the execution of the assignment. I understand, further, that

the plaintiff did not enter and take possession under the power given him by the assignment, until after the seizure by the defendant.

According to the case of *Holmes v. Vancamp*, it is clear that the execution creditors in this case might contest the validity of the assignment, although they did not recover judgment until after it was executed. The debt on which the judgment was recovered seems to have existed before.

I have no doubt that no goods passed by the mere force of the assignment but those stated in schedule A. As to any other goods, the assignment does not profess to pass them ; it only gives a power to enter and take possession of such goods, and to dispose of them. Until entry, there was nothing to affect the liability of these goods. The assignment did not name them, nor did the assignee, the plaintiff take possession of them. And as it is admitted that none of the goods seized were mentioned and included in the schedule, I think the rule for nonsuit should be absolute.

We must treat the assignment as "a conveyance, intended to operate as a mortgage." It was not intended the plaintiff should be the owner of the goods at all events. If the proceeds enabled him to pay the favoured creditors and then the other creditors, and left a surplus, McLeod would have been entitled to it ; and there is a provision for plaintiff relinquishing the goods and the trusts as soon as the favoured creditors are paid. As at present advised, I feel little, I may say, no doubt, that if one of several partners becomes a mortgagee, to secure a debt due to his firm, and makes the requisite oath, stating the debt to be due to himself and his partner, this is sufficient. But I am not prepared to hold that his affidavit of a debt due to a different firm can be held good. The statute says he must swear the mortgagor is indebted to him *in the sum* mentioned in the mortgage. Now he does, in the present case, swear this, when he makes the oath of a debt to himself and co-partners ; but he does not and cannot swear that the mortgagor is indebted to *him* for the debt due Henderson & Brother. So there are two sums mentioned in the mortgage, and, as to one, no affidavit, as required by the statute.

Then does this avoid the whole assignment. The words of the statute are very explicit, "*in the sum mentioned in the mortgage,*" meaning plainly, "in that amount which the mortgage is given to secure." And I apprehend the rule to be, that when a statute makes a thing void unless certain forms are complied with, the effect of a partial non-compliance is to avoid it altogether, and therefore the rule must be absolute to enter a nonsuit on this ground, independently of the first.

Rule absolute to enter a nonsuit.

# MOYER ET AL. V. DAVIDSON ET AL.

## *Chattel mortgage—Affidavit—Jurat.*

The words "sworn and affirmed," without saying which of the two deponents swore, and which affirmed, and omitting the word severally in the affidavit to a chattel mortgage. *Held* sufficient.

It is not necessary in affidavits sworn under a statute to conform to the technicalities required by rules of court.

TROVER, for a horse and other chattels and furniture. *Pleas*, not guilty, and the goods not plaintiff's.

The goods were seized by the defendant Davidson on an execution issued out of the county court of the County of Waterloo, in favour of John Klein (a defendant) against the goods and chattels of Joseph Gilles for £37 16s. 1d. The plaintiff's title to them was a chattel mortgage dated the 11th February, 1856, made to Joseph Gilles of the first part, and the plaintiffs of the second part, to secure payment of \$394.60.

The affidavit of the mortgagees was as follows ;

" Province of Canada, ) Personally came before us, William  
County of Waterloo. ) Moyer and Paul Schmitt, in the  
county of Waterloo, and province of Canada, who maketh oath  
and affirmation to say that Joseph Gilles named in the fore-  
going mortgage is justly and truly indebted to the said William  
Moyer, and Paul Schmitt in the sum of \$394.60c. mentioned  
in the said mortgage, and that the said mortgage was execu-  
ted in good faith, and for the express purpose of securing  
the payment of the money so justly due and not for the pur-

pose of protecting the goods and chattels mentioned therein against the creditors of the said Joseph Gilles.

(Signed) WILLIAM MOYER.

(Signed) PAUL SCHMITT.

Sworn

And affirmed before me at  
Berlin in the said County  
of Waterloo, this 11th day of  
February, A. D., 1856.

(Signed) D. S. SHOEMAKER.

A commissioner for taking affidavits in the Queen's Bench in and for the said County of Waterloo."

This mortgage was, with the above affidavit, and a proper affidavit of the execution of the instrument, filed in the office of the Clerk of the County Clerk for the County of Waterloo, on the 11th of February, 1856. The trial took place before *Burns, J.*, at Berlin, in November, 1857, and the only point raised was as to the sufficiency of the above affidavit. The defendant's council objected that it was uncertain which of the two mortgagees swore, and which affirmed. Leave was reserved to move to enter a nonsuit on this objection, and the plaintiffs obtained a verdict for £56 5s.

In Michaelmas Term *A. Crooks* obtained a rule *nisi* accordingly.

*M. C. Cameron*, in the following term, shewed cause. The affidavit is certain enough, and the defect, if it be one, is in the jurat. There is no objection in the mortgagees being both sworn and affirmed, and that is the literal meaning of the language used, or if it is to be read distributively, the first name applies to the first verb, and the second name to the second verb, and it will then read that William Moyer made oath, and Paul Schmitt affirmed. The rules of court do not apply to such affidavits, which, though sworn before a commissioner for taking affidavits, are not sworn as affidavits in any cause. The commissioner therefore derives his authority to administer them from the statute, which adds this authority to that which he derived from his commission, but does not subject the exercise of the power to those rules of practice which apply to proceedings in the courts. He cited *De Forrest v. Bunnell*, 15 Q. B. U. C. 370.



*Hector Cameron* in support of the rule, argued that no indictment for perjury would lie on this affidavit; that the jurat should contain the word severally. He cited *Reg. v. Bloxam*, 6 Q. B. 528; *Cobbett v. Oldfield*, 16 M. & W. 469.

DRAPER, C. J., delivered the judgment of the court.

I entirely subscribe to the opinion expressed in *De Forrest v. Burwell*, that we are not called upon to notice or sustain objections to affidavits, such as are required by the statutes relative to chattel mortgages, which rest only on their non-compliance with certain rules of court, established to regulate the practice and proceedings thereon. We need not require more than a full and plain compliance with what the statute substantially requires. The affidavit in question is not in technical form certainly, and possibly the commissioner has stated more than actually took place, for he states and certifies that these two parties made oath and affirmation before him as to the truth of their statement, and certainly their having done both when one would have been sufficient, cannot vitiate the affidavit. There is no uncertainty, for the language is precise, that both made oath and affirmation. In upholding this affidavit, we do not go as far as the Court of Queen's Bench has done, in *De Forrest v. Burwell*, while we affirm the principle asserted in holding that we should not go behind what appears on the face of the proceeding, where the statute has been complied with, its object has been answered, and where there is no suggestion of fraud. I think this rule should be discharged. The justice of this case seems certainly with the plaintiffs, and it is satisfactory to be able to uphold the verdict in their favour.

Rule discharged.

The Chief Justice referred to the following cases: *Rex v. Lilkstone*, 2 Q. B. 520; *Rex v. Whiston*, 4 A. & E. 607; *Rex v. Whitney*, 5 A. & E. 191; *Doe v. Gore*, 2 M. & W. 320; *Empey v. King*, 13 M. & W. 519.

## NOLAN V. TIPPING.

*Slander.—Misdirection.*

On a motion for a new trial on the ground of misdirection, as the court considered the evidence was properly left to the jury, although they would have been better satisfied with a verdict for the defendant, a new trial was refused.

DEFAMATION.—The words charged were, “you did not put the quarter dollar in the drawer of the till.” “You have been to your box several times yesterday, and you have put some money there, so you had best be getting ready to go away from here, and if you dont go away this day by the boat, I will have a constable take you.” Second count.—“I found him stealing a quarter of a dollar from the till and therefore dissharged him.

Pleas—Not guilty. 2nd to 1st count—That plaintiff had not put the quarter dollar in the till, but converted it to his own use, wherefor defendant discharged him.

3rd to 2nd count—Justifying that plaintiff had stolen the quarter of a dollar.—Issue.

At the trial, before *Hagarty, J.*, at Barrie, one McLeod, a constable, proved that defendant sent for him, told him to keep his eye on plaintiff, and if he did not go away in the boat to let the defendant know at once. Did not say the reason. Plaintiff did not go that day. O'Brien, a half brother of plaintiff, deposed that in consequence of what plaintiff told him he went to defendant, and asked why he dismissed his brother; defendant said that plaintiff had taken a quarter of a dollar, and explained the matter, that plaintiff had received a quarter of a dollar and not put it in the till.

James Moffatt deposed that he asked defendant why plaintiff had left his employment. Defendant said he had charges against plaintiff that would send him to the penitentiary, and he would do so if he did not clear out.

*McMichael*, for defendant, objected that there was no case to go to the jury. As all that passed was a privileged communication.

The jury were told that if defendant, in answer to questions from a relative of plaintiff (a very young man) as to why he had dismissed him, did in good faith without malice, and

believing what he said to be true, make the statement complained of, it was privileged, and no action would lay. The charge was very strongly in favour of defendant, but the jury found for plaintiff damages £5, and on two counts, and for defendant on other issues.

In Michaelmas Term, *McMichael* for defendant, moved for a new trial on the law and evidence, and for a misdirection on the part of the judge in leaving any thing to the jury, instead of nonsuiting the plaintiff, or at once directing a verdict for defendant on the ground of privilege. He cited *Taylor v. Hawkins*, 16 Q. B. 308.

In the following term, *S. Richards* shewed cause. He cited *Cooke v. Wildes*, 5 E. & Bl. 328; *Somerville v. Hawkins*, 10 C. B. 583; *Gilpin v. Fowler*, 9 Exch. 615.

DRAPER, C. J., delivered the judgment of the court.

All the cases material to be referred to were cited on the argument, for in one or other of them the preceding authorities and the principles they contain, are discussed. There is only one witness, a half brother of plaintiff, who proves any of the words spoken as laid in the declaration. The authorities are express and clear to shew that the occasion on which those words were spoken was such as to rebut the presumption of malice to which the speaking of slanderous words ordinarily gives rise. Had this been the whole evidence, there would have been no case for the jury. So, also, I think, would have been the case if nothing additional had been proved beyond the testimony of the first witness. But the testimony of the third witness, that he asked defendant why plaintiff had left his employment, and was told in answer, "I have charges against him that would send him to the penitentiary, and I will do so if he does not clear out," alters the case. I think this evidence brings the case within the two decisions of *Gilpin v. Fowler*, and *Cooke v. Wildes*, that they afford occasion for the inference of malice, in advancing the charges made to the brother. These words in themselves would have afforded a ground of action, for nothing is shewn to make the speaking of them a privileged communication. The witness was not enquiring into the

character of the plaintiff with a view of employing him, in which case it would have been the defendant's duty to have answered truly, and such duty would have repelled all presumption of malice. Slanderous words spoken before or after those charged in the declaration, whether spoken to the same person or to a stranger, and whether in themselves actionable or not, are admissible in evidence to prove malice. The cases of *Warwick v. Foulkes* (12 M. & W. 507), and *Simpson v. Robinson* (12 Q. B. 511), are strong authorities illustrative of this doctrine. In my opinion therefore, the learned judge could not have withdrawn the question from the jury. He left it to them with a charge strongly in defendant's favour, and I should have thought they were exercising a sound discretion in finding for defendant. But I do not see any sufficient reason for setting aside the verdict in the fact that they have come to a contrary conclusion; there was evidence and properly left to them, and the verdict fortunately is but small.

Rule discharged.

Referred to by the Chief Justice:—*Ruckley v. Kiemanie*, 30 L. T. 103.

## STOCK V. THE GREAT WESTERN RAILWAY CO.

### *Special contract—Damages—Common counts.*

The plaintiff entered into an agreement (not sealed by defendant) for the performance of certain work at specified prices, with a condition that the defendants should have the right of stopping the work at any time paying plaintiff for the damage thereby occasioned. Detentions were made, which the company's engineer swore were allowed for in the estimates and certificates. The plaintiff also sued on the common counts. At the trial defendants's counsel contended (successfully) that the plaintiff could not recover under the special contract. Each item was left specifically to the jury, who found for the plaintiffs, for the demurrage, irrespective of other claims, on a motion for a new trial on the law, evidence and misdirection.

*Held*, that the defendants having denied the contract upon which the plaintiff's first count was based, could not invoke its aid to defeat the plaintiff's claim upon the common counts. A new trial was, however, granted on payment of costs on the ground of excessive damages.

The first count of the declaration is upon a special contract made between plaintiff and defendants, dated the 6th of February, 1855, whereby plaintiff agreed to do all the work and find all the materials except the railway iron to



complete the excavation at the defendant's depot at the Suspension Bridge, at certain named prices for excavating and hauling, payments to be made monthly up to ninety per cent. as the work went on, and the residue, when it was completed. The defendants reserved the right of stopping the work, remunerating plaintiff for damage thereby occasioned. The plaintiff to be liable for all damage happening by reason of his operations. The defendants to use their best endeavours to prevent the plaintiff from sustaining let or hindrance by the engines or cars during the performance of their contract. Averment, that plaintiff provided horses, carts, excavators, machinery, and other tools for doing the work, and executed a large portion of it. Breach 1st. That defendants did not use their best endeavours to prevent plaintiff from sustaining any let, or hindrance by the engines or cars of defendants; but by their servants or agents, and by means of their engines and cars, and placing them in plaintiff's way and across the track on various occasions, and allowing them to remain there wrongfully and unnecessarily, caused plaintiff great hindrance and delay in doing the work, whereby the work cost plaintiff, a large sum, viz., £—— more than it otherwise would have cost him. 2nd breach. That though plaintiff was willing to finish the work, and there was a large part unfinished, yet defendants would not suffer plaintiff to finish it, but closed the contract and stopped the work, and though plaintiff suffered great loss, in that he was thereby hindered from making large gains which he otherwise would have made, yet, defendants have not paid the damage so by him sustained by stopping the said work and hindering him from completing the same.

There are also common counts for work and labour, money, and an account stated. Pleas—1. Did not promise. 2. That defendants did use their best endeavours to prevent let or hindrance to plaintiff. 3. That they did not prevent plaintiff, but on the contrary permitted him to complete all the work which, by the contract, they agreed to let him do. 4. That after the detention complained of, they paid him a sum of money in full satisfaction of the damages occasioned

thereby. 5th to the common counts. Never indebted.  
6th to the common counts. Payment.

The case was tried before *Draper, C. J.*, at Merrittsville in October last. The evidence shewed clearly that the plaintiff had a just claim for the sum of £1062 2s. 8d., being the ten per cent. withheld at the different monthly payments in pursuance of the contract, and which the plaintiff was entitled to, when he received his last monthly estimate; but which the defendants refused to pay him unless he would give a receipt in full of all demands. As to the residue of the demand, it consisted principally of a charge exceeding £1,600 for detentions and delays caused, as the plaintiff alleged, by the improper and negligent conduct of the defendant's servants in obstructing the progress of the plaintiff's work, by allowing engines and trains of cars to stop for great and unnecessary length of time on the ground across which plaintiff had to carry the earth removed by the excavation he was performing under his contract, and by their creating a large freight house and other buildings, and laying down other tracks for cars to pass, which interfered with the progress of the plaintiff's work. There were some minor demands arising consequentially from the same causes, as by making the plaintiff's work more expensive to him, as the delay forced him to do part of the digging in winter by hand labour, instead of by excavators he was using when the ground was not frozen. The plaintiff called some of the defendants' engineers as witnesses, and on cross-examination, they stated that the price allowed per cubicyard for excavating was higher than would have been paid, but that it was contemplated the plaintiff would unavoidably be subjected to hindrance by the trains of the defendants in the daily prosecution of their ordinary business. And that moreover an allowance had been made in the monthly estimates for such detentions or other damage, as, in the judgment of the engineers, could be fairly considered extraordinary, and not within the contemplation of both parties, and that the plaintiff had been paid for these. The engineer conceived that the discretion of making or refusing such allowance rested with him. The plaintiff's evidence of the extent of his claim was at first of a loose and unsatis-

factory character, consisting chiefly of proof of the fact of detention at unspecified times, and of uncertain duration, of which some witnesses said, they, as foremen, made a report each night to a clerk, who made the entries of the time lost by the detentions, and he swore he entered it in a daily journal from which the aggregate of several sums during the different months was posted from time to time; and he made out between the 1st and 10th of July, 1857, the account which he produced, and stated he could not produce the daily journal, for it was left in Missouri, and he was examined at great length in the endeavour to make out the claim from his own knowledge or recollection of facts, apart from the entries in the daily journal or his written account. Just at the close of the plaintiff's case, however, the witness produced the book. The plaintiff's claim was submitted item by item to the jury with comments on the evidence. They were told the evidence shewed his right to recover the ten per cent., and that they might reasonably add interest. The evidence as to the price of 25 cents per cubic yard excavation being meant to cover expected delay and that an allowance for extraordinary delay had been actually made, was submitted to them as well as the mode in which the extent of the delay was finally proved. The trial lasted till a very late hour, about midnight, and the jury retired with an understanding they might disperse on delivering a sealed verdict. On the following morning they assembled in court and confirmed the verdict written by them previously; finding for the ten per cent. withheld £1141 3s. 9d., for detentions, £1000, for extra digging in winter £100, and for the hire and use of plaintiff's horses, &c., on a particular occasion, £6.

In Michaelmas Term, *Connor*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, and receiving improper evidence, and that plaintiff should pay the costs of the last trial, unless he consents to reduce his verdict to such sum as the court should think just.

The rule *nisi* was granted upon condition that within ten days the defendants should pay the plaintiff £1141 3s. 9d., the first item specified in the verdict.

The condition was complied with, and in Hilary Term *O'Reilly*, Q. C., shewed cause. He contended that the evidence was admissible on the common counts, and that under them the plaintiff could recover the value of his work under the disadvantage to which the defendants' conduct subjected him.

*Boomer* supported the rule.

DRAPER, C. J., delivered the judgment of the court.

I have great difficulty in making up my mind in this case, but the conclusion at which I have arrived is, that the plaintiff may recover on the common counts. The defendants denied the contract on which the first count was based. It was not under their corporate seal, and was signed by a person whose authority to bind them the plaintiff could not prove. But though this denial prevented the plaintiff from recovering for their alleged violations of stipulations it contained, he was able to shew that he had done a great deal of work for them, and that it was done under such circumstances as raised fairly a question of value beyond what he had received. The defendants have enjoyed the benefit of this work and have availed themselves of it to the fullest extent. I do not think they can invoke the contract which they deny in regard to the plaintiff's cause of action in the first count to repel his demand on the second, and therefore I think he has a right to prove what work he did, what its fair value was, and whether its ordinary value and cost were enhanced by the acts of the defendants themselves for whom the work was done. If there was no binding contract then the plaintiff is to be considered as suing upon the implied promise which results from a consideration executed on his part, and of which the defendants have reaped the advantage. I was under a different impression at the trial, and admitted the evidence with a strong leaning the other way, but thought that if the plaintiff was entitled to recover, it would be better to let the case go to the jury at once, instead of on a subsequent occasion, as must have been the case if my first impression was acted upon and was wrong.

The difficulty that I felt arose from the circumstance that



the parties had in effect been affirming the contract on both sides. The plaintiff claimed and the defendants did not deny their liability for the payment of the ten per cent., which was only withheld in accordance with the terms of that contract, though without reference to its terms such a specific sum would not have been withheld, being ten per cent. on some other sum which was claimed and was admitted to have been due for work done.

The defendants, however, meet an alleged breach of one of the terms of this contract by denying its validity, and they ought not, as I think, at the same time, to set up another part of it to prevent the plaintiff's recovery, and so far therefore, I have come to the conclusion that the action is maintainable on the common counts.

But we are all of opinion that, considering the amount received by the plaintiff, and the evidence of the rates at which the defendants did in fact pay him and the further sums which he received for the increased expense of executing the work, that the present verdict is larger than the evidence warrants. There is, in the present case, the more reason for our interfering, because the defendants' counsel may have relied on the view I took of the plaintiff's right to recover, and may not have addressed himself as fully as he otherwise would have done to the question of amount. But as the ground of our granting the new trial is, that we think the jury have given a larger sum than a more careful consideration will shew to be right, we can only make the rule absolute on payment of costs.

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#### BALL V. GILSON ET AL.

##### *Promissory note—Surety—Demurrer.*

*Held*, that the payee of a joint and several promissory note, made by two, can only be treated as holding one as a surety for the other upon his express consent to do so at time of taking the note.

DECLARATION was as follow: for that the defendants on the 4th day of May, in the year of our Lord, 1855, by their joint and several promissory note now over-due promised to pay to the plaintiff £150 one year after date, but did not

pay the same. For money payable by the defendants to the plaintiff, for money lent by the plaintiff to the defendants, for interest upon and for the forbearance at interest by the plaintiff to the defendants at the defendants' request, of money owing by the defendants to the plaintiff; and the plaintiff claims £200. To which the defendants pleaded that they were sureties only on the making of the said note. That the money thereby secured was lent to the said Samuel D. Gilson only, and that after the said note became due and payable, to wit, on the 8th day of May, in the year of our Lord, 1856, the said plaintiff, without their knowledge or consent, did, for a valuable consideration, to wit, the payment by the said Samuel D. Gilson to him of the sum of £22 10s. agree to forbear and give further time for the payment of the said note, for one year from the time of the said agreement, and the said payment so made as aforesaid, and so the defendants Walter Follett and James Butler say that they were and are thereby discharged from the payment of the said note.

The plaintiff demurred on the grounds that a person appearing on the face of an instrument, to be a principal debtor jointly with another cannot set up as against third parties that he only a surety. And that there is no averment that the defendants, Follett and Butler, were accepted by the plaintiff as sureties.

*Irving*, for demurrer, cited *Manley v. Boycot*, 2 E. & B. 46; *Strong v. Foster*, 17 C. B. 401.

*Eccles*, Q. C., contra, referred to *Byles on Bills*, 156, note 1; *Vorley v. Barrett*, 26 L. J. C. P. 1; 1 C. B. N. S., 225; *Clark v. Wilson*, 3 M. & W. 208, and contended that it was quite immaterial that there is no averment that plaintiff knew that defendant was surety.

The taking of a collateral security does not amount to giving time.

DRAPER, C. J., delivered the judgment of the court.

The plea is clearly bad for the reason assigned by *Lord Campbell* in *Manley v. Boycot* (2 E. & B. 46). It does not allege the note was delivered by defendants Follett and

Butler as sureties for Gilson, or that plaintiff agreed to receive it from them as such sureties. If the payee of a joint and several promissory note made in the common form by two, may be placed in the situation of treating the one as surety for the other, this can only be by his express assent to do so when the note was delivered to him.

The plaintiff is entitled to judgment on this demurrer.

The Chief Justice referred to the following cases:—Hall v. Wilcox 1 Mo. & R. 58; Fentum v. Pocock, 5 Taunt. 192; Price v. Edmunds, 10 B. & C. 578; Clarke v. Wilson 3 M. & W. 208; Harrison v. Cortauld, 3 B. & Ad. 36; Hollier v. Eyre, 9 Cl. & Fin. 1; Terril v. Higgs, 4 Jur. N. S. 41, and the cases cited in argument.

#### REG. EX REL. FORWARD V. BARTELS.

##### *Quo Warranto—Residence—Infancy.*

*Held*, That when a party slept and lived during the week days in a house with other parties having one common entrance, while his wife and family resided at a village a few miles distance, he came within the provisions of the Municipal Corporation Act of 1849, and was entitled to vote under that act as a resident householder in the village where he lived during the week. When a vote had been rejected by the judge who decided the case, upon erroneous grounds, but upon further enquiry by the court it was found to be a bad vote on other grounds, they refused to allow it.

*Held*, also, that upon a question of the age of a voter the written memoranda and return of the clergyman who married his father and mother was better evidence than the memory of individuals unaccompanied by any memoranda.

Solicitor-General *Smith* on behalf of defendant obtained a rule on the third day of Term, calling on the relator to shew cause why the judgment of the judge of the county court of the united counties of Frontenac, Lennox and Addington, declaring that the defendant Bartels usurps the office of councillor for the incorporated village of Napanee, and that relator is entitled to the same; and awarding relator his costs, &c., should not be reversed and altered so as to adjudge the said office to defendani, and that he be dismissed from the matters charged against him in the relation; and that he recover from relator his costs of defence

and of this motion, or so as to award a new election in the premises, with costs against relator or otherwise as to the court may seem meet on the grounds—

1st. That the said judge struck off from the votes of defendant the names of Samuel Wilson and John Abrams, they being legally entitled to vote.

2. That the judge admitted improper evidence on the part of relator as to the age of the said John Abrams, and did not give proper weight to the evidence of defendant as to that point.

3. That the judge refused to strike out from the relator's votes the name of William Long and the name of Thomas McKenagh entered on the poll-book as Thomas McKinnon, neither of them being entitled to vote at such election; the said Long not being a resident freeholder or householder of the village, and the name of McKenagh not having been entered on the collector's roll of the village as a freeholder or householder thereof.

4th. That the judge refused to allow the defendant to except to the vote of McKenagh entered on the poll-book as McKinnon, or to shew that neither Thomas McKenagh or Thomas McKinnon were entitled to vote, neither of such names being on the collector's roll, nor was he allowed to shew that Thomas McKenagh voted as Thomas McKinnon, having no vote.

5th. That the judge refused to allow defendant to amend his written statement by adding: or McKinnon, after Thomas McKenagh therein, and wrongfully held that the defendant was precluded from objecting to the vote of Thomas McKinnon, as he had not excepted to the vote of any person named Thomas McKinnon in the said statement, although in fact, and the defendant so offered to prove, no person of the name of Thomas McKinnon had voted or was entitled to vote, and that the real name of the person whose vote is entered on the poll-book as Thomas McKinnon is Thomas McKenagh, and that he had no vote.

6th. That the judge should have struck off from the votes of relator the votes of William Long and Thomas McKenagh, or McKinnon, which would leave the number of legal votes



polled for the relator 115, and should not have taken the votes of Samuel Wilson or John Abrams from the defendant's list, which would make the number of votes for the defendant 117, giving him a majority of two over the relator.

When the case was presented for the consideration of the learned judge of the county court, it appeared that the defendant had been returned by a majority of two votes, the votes at the close of the poll being for the relator 117; for defendant 119. Relator claimed that the returning officer had refused or omitted to enter for him two legal votes, and that defendant had polled five illegal votes. Defendant in addition to the general denial of relator's statement as to the votes referred to, contended that *three* of relator's votes are bad.

Under the decision of the judge of the county court two of defendant's votes are declared bad, and his decision as to these not being objected to, the case as to the state of the poll comes before the court as follows: Relator 115; defendant with the two bad votes struck off, 115. Defendant now contends that the vote of William Long for relator should be disallowed, he being a non-resident, and that the vote of Thomas McKenagh who voted for relator as Thomas McKinnon should also be disallowed, as he was not qualified to vote. He further contended that the vote of *Samuel Wilson* which the county judge had disallowed should be allowed to him. (Note, Wilson is not one of the votes admitted to be bad, and if the votes be reckoned 115 for each candidate, that includes Wilson's name as standing as a good vote for defendant for the present), the said Wilson having been in fact a resident of Napanee when he voted. Defendant also contends that John Abrams rejected by the county judge as a minor should be considered a good vote. On the other hand, relator contends the decision of the county judge as to these four votes was correct, but submits that the votes of John Cavenagh tendered for him, and the vote of John Black, who he contends voted for him, should be allowed him, although the county judge was of a different opinion. The matter brought before this court is the consideration of the decision of the county judge in relation to these six votes.

1st. William Long, who voted for relator, and whose vote was allowed by the county judge, but defendant contends he was not a resident of the municipality at the time of the election.

2nd. Thomas McKenagh, who voted for relator, and whose vote was allowed by the judge, but defendant contends he was not duly qualified, his name not being on the assessment roll.

3rd. *Samuel Wilson*, who voted for defendant, but whose vote was disallowed on the ground of non-residence.

4th. *John Abrams*, whose vote defendant contends should have been allowed to stand for him, as the evidence shewed he was twenty-one years of age.

5th. *John Cavanagh*, who tendered his vote for relator, but was not permitted to vote by the returning officer, and which vote the county judge refused to allow, on the ground that the name on the assessment roll was "*John Caven*," and not *John Cavanagh*; and

6th. *John Black*, who relator contends tendered his vote for him, but the same was refused or omitted to be taken down by the returning officer, which vote the county judge refused to allow relator. -

During the term *S. Richards* shewed cause, and as to the vote of Long contended that he must be considered as a duly qualified elector: that he was rated on the assessment roll as a householder: that he was such householder at the time of the election, and was then a resident: that he may have had a *domicil* elsewhere, but that he then resided in Napanee: that a person may have two or more residences: that under the imperial statute 2 Wm. IV., ch. 45, in relation to the qualification of voters, it is stated that no person shall be qualified to vote for a borough as a free-man "unless he shall *have resided* for six calendar months previous to the last day of July" in the year in which the registration takes place within the borough, and in argument in *Whitthorn v. Thomas* (7 M. & G. 1) under that statute it was admitted that a man might have more than one residence but it must not be a mere colourable appearance of a residence. He referred to *Rex. v. Sargent*, 5 Jurist, 466 ;

Rex. v. The Duke of Richmond, 6 Term Reports, 560; and Rex. Mitchell, 10 East 517.

As to Thomas McKenagh, that he was the person who was really rated for the property, and ought to be permitted to exercise the right of voting, and if defendant's objection was that he could not vote because there was a mistake in entering his *name* on the roll the question raised that the name of the voter was not objected to was not correct in defendant's statement was equally just, and ought to prevail. He referred to Rex. v. Thwaites, 1 E. & B. 704, to shew that the party who was intended to be assessed, and who occupied the premises at that time, ought to be allowed to vote, although there was a misnomer; and he for the same reason contended that the vote of John Cavanagh tendered for relator ought to be allowed, his name being entered on the roll evidently by mistake as John Caven: that a bad writer and one who did not know how to spell the name might have written it John Cavena, and when transcribed it might be written Caven: had it been put down *Cavena*, being *idem sonans*, there would be no doubt. As to Samuel Wilson, he was not a resident householder at the time of the election, and in fact never did rent a house: that his mother rented the house which was assessed in his name, but had removed from that house to another, with which the voter had no connexion; that he had removed from the place of which he was only a resident, as having lived and boarded with his mother, and that he had merely casually returned as a visitor, and therefore his vote was bad.

As to the vote of John Black, there was evidence both ways as to his right to vote, and perhaps the court would not feel at liberty to disturb the decision of the county judge on this point. That the weight of evidence was clearly against Abram being 21 years of age, and that the county judge having had the opportunity of hearing several of the witnesses, has decided on a matter of fact on which the weight of evidence was in favour of his decision, and this court would not interfere with his decision.

*Solicitor-General*, contra, contended that under the municipal act it was contemplated that an elector should be

allowed to vote but in one municipality, and in cities, although rated in several wards, he must vote in the ward where he resides, if rated in that ward. That for the purposes of voting at a municipal election, a man could not have two residences. That Long's residence and domicil must be where his principal establishment was, and where his wife and family resided, and to which he intended to return when the purposes of his temporary absence were accomplished, and to which he in fact was in the habit of returning weekly. That the authorities as to domicil shew that a man does not lose it by a mere temporary absence, and the domicil of his mother would be the domicil of Wilson, and therefore the judge ought to have allowed that vote for defendant.

That was to McKenagh, he was the person who voted, and in giving notice of the objected vote, it was necessary to name the person who voted, as he would be known; whereas, if the name of McKinnon had been given, it might be urged that no such man voted. Admitting that it would have been free from all objection, if the statement had been, that defendant objected that Thomas McKenagh, who voted for relator under the name of Thomas McKinon, had no vote, yet, relator was not prejudiced in the matter, as the person was present at the investigation, and the county judge should have permitted the enquiry into his vote, or should have allowed defendant to amend his objection, and granted relator further time to shew cause as to that vote if he desired it. That neither the names of Thomas McKenagh or McKinon is on the assessment roll, and therefore this vote should be struck off relator's list.

As to John Cavanagh, his name is not on the assessment roll, the name there being "John Caven." That he is not therefore entitled to vote. As to John Black, the evidence shews he did not vote for relator, though he may perhaps have intended to do so. That from the facts placed before him in relation to both these votes the decision of the county judge was correct. That the vote of John Abrams ought not to have been struck off the list of voters for defendant. That the oaths of the father and mother as to the



time of his birth, with the other facts sworn to, and his being a married man, and received by his friends as of the age of 21 years, ought to be considered as conclusive evidence of the fact, and that the certificate of marriage, which on its face mentions the name of the voter's mother, as Mary Youngs, whilst her name was Anne Youngs, although endeavoured to be explained as a mistake, ought not be permitted to cast a doubt on the evidence, so clear and positive, given as to his birth.

RICHARDS, J., delivered the judgment of the court.

The motion in this matter is made under the 151st and 152nd section of The Municipal Corporation Act of 1849, which provides that no mandamus or other writ shall issue on the judgment of a judge until the same shall have been in possession of the court for four days in term time, nor while any rule shall be pending for the reversal or alteration of such judgment by the court. And that every such preliminary judgment so to be given by any judge shall be examinable by such court in term time on an application for that purpose, made within such four days, either by the party against whom such preliminary judgment was given, or by any other party interested either as a voter or candidate in such election, and the same may be thereupon reversed, altered or affirmed by such court, either with or without costs, to be paid by the party against whom the decision of the court upon whom such application shall be given, as in the judgment of such court the law of the land shall require. The qualification of the electors in incorporated villages under section 57 of same act as amended by 14 & 15 Vic., ch. 109, schedule A., No. 11, is as follows: "The persons entitled to vote at such election shall be the *freeholders and householders* of such villages, whose *names* shall be entered on the said roll *as rated* for rateable real property held in their own names, or that of their wives respectively, as *proprietors or tenants* thereof, to the *amount of three pounds per annum* or upwards, and who, at the time of such election, shall be resident in such village.

The vote of William Long was resisted on two grounds:

first, that he was not resident in Napanee at the time of the election within the meaning of the statute, and, second, that the house he occupied was not a dwelling-house, not having a separate outer door. He appears to be rated on the roll as a householder in a house owned by John Henning. J. Maddon, the assessor, stated that he assessed Long at the request of the landlord, and left a notice with the former on the street. That he occupied a building belonging to Henning; that other persons lived there, and went out and in by the same door. He further stated he never was inside the house, and did not know how many rooms he had. John Henning, the landlord, stated that Long had been in his employ for six or seven years at Napanee as a moulder; that he rented a house from him last April: that he has lived there since. He sleeps and boards there, and one of his sons has been with him all the time, and another some part of the time; that a man and his wife have lived with him since October, and the man's wife cooks for him. He owns a house and lot in Newburg, and his wife lives there. He generally goes home to his wife on Saturday evenings, but occasionally remains over Sunday at Napanee. Long rents a quarter of the building; he has a separate entrance from the building to the street. He did not vote at Newburg. In argument it was suggested under this evidence, that Long when assessed, might have occupied only a room, not having a separate entrance to the street, but that he might have subsequently obtained an apartment with a separate entrance. I think, however, the fair conclusion is, that he was rated for the premises which he now occupies, and which he leased from Mr. Henning. He at all events appears on the roll rated as a householder, and in the absence of conclusive evidence to the contrary, we must assume, under the facts before us, that he was a householder within the meaning of the act. The more difficult question is, whether, at the time of the election, Long was a resident householder in the village.

There is no dispute about the facts, that for several years past he had worked at his trade as a moulder in Napanee, and that once a week, generally on Saturday night, he went

home to the residence of his wife in the village of Newburgh, several miles distant from Napanee; that he owned the house in Newburg; that his wife always resided there, and probably the larger part of his family, he having seven children; that one, and sometimes two of his sons resided with him in Napanee, where he had taken a house in which he boarded and lodged, and for which he had been rated on the assessment roll of the previous year. Corporally he was no doubt resident for the greater part of the time in Napanee, and if the argument used in some of the cases that as burgesses were required to do watch and ward, and that required personal service, therefore, where the personal residence was, there the rights of a burgess could be exercised, and that the corporal residence would be that contemplated by the law. This argument has never been allowed to operate to so great an extent as to reduce the courts to declare that a man's *domicil*, where his wife and family resided, and where he kept up his largest establishment, and to which he intends to return, was not his residence, or that he was not resident there for the purpose of exercising his franchise. There can be no doubt that *domicil* and residence are two different things, *Lord Campbell* says in *Regina v. Stapleton*, 1 E. & B., p. 771, a man may be resident in one country and domiciled in another, "and he may be equally a resident of one township or village, and domiciled in another. Lon's *domicil* was, without doubt, at Newburg, and his residence at Napanee, whatever effect it may have, was *bona fide*. The case in 7 Man. & Gran. page 1, of *Whithorn and Thomas*, clearly contemplates that a man may have more than one residence. By the statute there under discussion it was enacted that no person shall be qualified to vote for a borough as a freeman, "unless he shall have resided for six calendar months previous to the last day of July" within the borough in the year in which the registration takes place. Chief Justice *Tindal* says, the residence required by the statute must mean an actual occupation for some part of the time by the party himself, or an occupation by his family or servants. In that case the voter, as in this, had undoubtedly a residence, and *domicil*

at another place, and the court, in rejecting his vote, did so on the express ground that the residence in right of which he claimed to vote was not *bona fide*. The learned *Solicitor General* referred to the language of *Mr. Justice Earl* in that case as shewing that it was contended the party should have some local interest in the borough, and referring to the ordinary meaning of the word residence, as conveying the idea of home. This language was referred to in *The Queen v. Stapleton*, when the learned judge in reference to it said, "That was not intended as a general definition of residence. I doubt if you will find such a definition any where: but I am sure you will not find it given by me, for it has been a *disideratum* to me for many years, and I never could find or frame a definition satisfactory to my mind." Looking at the authorities on the subject generally, and considering the inclination of courts to hold in favour of the franchise, I am of opinion that William Long was, at the time of the election, resident in the village of Napanee, and being a householder and rated on the assessment roll, he was qualified to vote. *Lord Campbell's* observations as to domicile and residence in *The Queen v. Stapleton* are also instructive. As to the vote of Thomas McKenagh, without deciding that the ruling of the learned judge of the county court was correct, there may be a good deal urged in favour of it, particularly if he thought the relator would be prejudiced by want of sufficient notice as to the vote that was to be attacked. If, however, the relator could not have reasonably been prejudiced by the want of a specific reference to the name under which the voter was entered on the roll book, and the judge had so considered, it appears to me he would have only exercised a sound discretion by enquiring whether the party complained of had a right to vote or not. As the result of the case will not be affected by this vote, it is not necessary to make any express decision as to it, the case of *Regina v. The Mayor, &c., of Wakefield*, reported in 30 L. T. 273 is an authority in favour of the defendant's view. *Samuel Winslow*.—If we consider residence as a mere question of domicile, it is probable this voter never selected another domicile; it was the residence of his mother, and



would be considered his home until he selected another; but he had at the time he voted no peculiar connexion with the municipality; he was not then a resident householder, for the house for which he was rated was not then in his occupation, or that of his mother; she had given up the house for which her son was rated some months before the election, and it was occupied by another person, and she had taken another house in her own name.

In the case of *The Queen Ex. Rel. Wallis v. Bostwick*, reported in vol. 2, U. C. Law Journal, p. 166, the learned Chief Justice of Upper Canada, held that when a voter was not a householder at the time of the election his vote must be rejected. It does not appear that Samuel Winslow was a householder at the time of the election. On the contrary, it is shewn that he was not. The question as to whether he could be considered a *bona fide* resident of Napanee at the time he voted admits of this discussion. The objection to his vote seems to have been taken in that form. If his vote was good in all other respects, and he did undoubtedly possess a freehold or even a leasehold property there at the time of the election, it would be evidence to confirm the view that he was a resident there; but when those essential elements are wanting to connect him with the place by ties of interest, his absence for a considerable time, and his return for only a few days, and his second departure, being without any family, may lead to the conclusion that he would not be a resident in the eye of the law for the purpose of voting, although, until he selected some other domicile, that place in law might be considered his domicile for many purposes. It is clear he is not a householder at the time of the election, and taking this into consideration with the other facts, and considering the point of residence doubtful, the judge of the county court referring to the want of household qualification as well as want of residence in the judgment pronounced by him, I do not think, even if we were quite clear on the point of residence, that we ought to direct an undoubtedly bad vote to be allowed contrary to his decision, although he might be mistaken as to one of the grounds on which he had made it.

*John Abrams.*—As to the date of the birth of this voter, there is conflicting evidence; but there are certain facts about which there is no dispute, viz., that the voter's father was Isaiah Abrams, and his mother Ann Youngs, whose maiden name was Ann Macpherson; that Isaiah married the widow of Henry Youngs; that they were married by the Rev. Philip J. Roblin, and that John was born about a year or 15 months after the marriage. The father states that he was married, and John born before the rebellion, and that he was in Casey's troop of dragoons, and speaks of the first rebellion. None of the parties speaking of the birth of John refer to any written memoranda or record of his birth. Several witnesses speak positively as to John being 21 in January, 1858; his mother, amongst the number; and some refer to the ages of children of their own, born about the same time, as confirming them in their view as to his age. Then in the return of Mr. Roblin, Isaiah's wife is called Mary Youngs, whilst her name was Anne. Mr. Roblin states, however, that she is the same person who was married by him to Henry Youngs by the name of Ann Macpherson, on the 7th of July, 1835. There can be no doubt from the evidence that the present Mrs. Isaiah Abrams was the Anne Macpherson who was married by Mr. Roblin to Henry Youngs on the 7th of July, 1835, and that she was afterwards married by Mr. Roblin to Isaiah Abrams. The date of this marriage becomes important in connexion with the other fact, not I apprehend, dispute that John was not born until a year or fifteen months after that marriage, and in this view the evidence is undoubtedly admissible. Mrs. Abrams stated in her affidavit that John was born on the 6th of June, 1836; but she does not mention the day of marriage. Another witness, Mrs. Lucas, stated that Mrs. Abrams had one child by her former husband, Henry Youngs. If that child was born the proper time after her marriage to him in July, 1835, and there is nothing suggested to the contrary, it would be impossible that John Abrams could have been born on the 6th of January, 1836. Mr. Roblin has no doubt as to the fact that his return contains the correct date of the marriage of Isaiah Abrams to the

widow Young, formerly Ann Macpherson, but thinks putting Mary Young instead of Ann was a mistake. The return appears to be a return of all the marriages celebrated by him during the year, commencing on the 4th of July, 1836, and ending on the 4th of July, 1837, inclusive, and was required to be made by him under the provisions of the statute 11 Geo. IV., ch. 36, sec. 6. It is preceded by some 24 entries, and followed by 15. In the regular order of dates and date of the marriage immediately preceding is the 14th of July, then followes the entry:

Isaiah Abrams and Mary Youngs, July 21. 1837. Names of witnesses: W. Macpherson, F. L. Lager. "Banns," (meaning married by publication of banns). Then follows the next entry, under date March 1, and this return was filed in the office of the clerk of the peace on the 17th of August, 1837, and has been on file there ever since. In Isaiah Abram's affidavit first filed, he seems uncertain about John's age, or the date of his own marriage, or John's birth. He seems to refer to his being called out to serve in the dragoons, Casey's troop, as being connected with his marriage or the birth of his son. He speaks of the *first* rebellion, meaning, I suppose, December, 1837. He was undoubtedly then married. If he refers to the service in Caseys's troop for the birth of John, then Mr. Roblin states that troop as being called at the time Vanscholtz came to the windmill near Prescott, and this was in November, 1838.

Looking at the evidence brought before the county judge, I think he was right in placing more reliance on the written records of the marriage of the mother of John Abrams as fixing the date of his birth, then on the recollection of individuals as to the event unaccompanied by written memoranda. I am, therefore, of opinion that this vote was properly rejected, and struck from the list of defendant, on the ground that John Abrams was not twenty one years of age at the time of the election.

*John Black.*—The weight of evidence and authority is undoubtedly in accordance with the view taken by the county judge as to this vote, and the returning officer was justified in not recording it for relator.

*John Cavanagh.*—The case of *Rex v. Thwaites*, 1 E. & B., 704, shews that where the name of a burgess was by mistake entered in the roll as James Cowal instead of Joseph Cowal, and he signed the voting paper as James Cowal instead of Joseph, and voted as James, that the vote was good, holding that he was the person whose name was on the list, though there was an error in entering the name. The statute 5 & 6 Wm. IV., ch. 76, under which that case was decided, provides, section 29, that every burgess of any borough who shall be enrolled on the burgess roll for the time being of such borough shall be entitled to vote in the election of councillors \* \* \* for such borough, and no person who shall not be enrolled in such burgess roll for the time being shall have any voice, or be entitled to vote in any such election. Section 34. No enquiry to be permitted at the election except that a voter may be asked on delivering his voting paper.

1. Are you the person whose name is signed to the voting paper now delivered in by you.

2. Are you the person whose name appears as A. B. on the burgess roll now in force for this borough, being registered therein as rated for property described to be situate in (here specify the street, &c.) Sec. 142 provides that no misnomer or inaccurate description of any person in any roll list, notice, or voting paper required by this act shall hinder its full operation with respect to such person, provided the description be such as to be commonly understood.

Under sec. 122 of 12 Vic., ch. 81, "each and every person whose name shall appear upon the collectors' roll or copy thereof as having been taxed as a freeholder or householder in any such \* \* village to an amount sufficient to entitle him to vote at such election shall be entitled to vote at such election without any further enquiry, and without taking any oath or affirmation other than that he is, the person named in such collector's roll. That he is of the full age of 21 years \* \* a subject of her majesty. That he is a resident within such \* \* village \* \* and that he has not before voted at such election.



There is no provision as to misnomer or misdescription in our act similar to the English statute. The decision in *The Queen v. Thwaites*, seems to go on the ground that the misnomer was cured by the 142nd section,

The opinion of the Chief Justice of Upper Canada in the case already referred to 2 L. Jour. U. C., p. 166, in relation to Edward Cox's vote, who was assessed as Henry Cox, is an authority in favour of the view taken by the county judge as to Cavanagh's vote, and the difference between the language and provisions of the two statutes may reconcile this last decision with that of the Court of Queen's Bench in England, in 1 E. & B., both decisions being on the point of misnomer as to a christian name of a voter on the roll or list. It is not necessary, however, to discuss this question further, as our opinion as to the other votes makes it unnecessary to decide this point. On the whole, the result of the consideration of the votes is as follows:

Votes at the close of the poll.	
For relator.....	117
For defendant.....	119
Votes deducted before the county judge and judgment	
concurring in: Stephen Benson and Robert Bailey...	2
	117
The votes of Samuel Wilson and John Abrams also	
disallowed.....	2

Leaves for defendant..... 115

Considering the votes of Long and McKenagh for relator goods, this will give him a majority of two votes without allowed either the vote of Black or Cavanah, and if McKenagh's vote were disallowed, he would still have a majority of one.

We therefore think the judgment of the judge of the county court should be affirmed.

The following case on the subject of domicile may be referred to in addition to those mentioned, *Walcot v. Botfield*, 18 Jur. 570, and the very elaborate judgment of Vice-Chancellor *Sir W. Page Wood*, in *Forbes v. Forbes*, in the

same volume. p. 643; neither of these cases are on questions arising out of the right of voting, but are still interesting on the questions of domicile and residence. Reg. v. East Stonehouse, 4 E. & B. 901.

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## RICE v. THE PROVINCIAL INSURANCE COMPANY.

### *Fraud—Misdirection.*

In an action on a policy of insurance.

*Held*, That the sixty days allowed for the payment of the money by the condition, is to be counted from the time the insured puts in the proofs he relies on, and that every exception to such proof must be raised by a special issue not under that condition.

The question of fraud on a policy of insurance is one for the jury, and although the court may be dissatisfied with the value set upon his property by the assured, still unless he appears to have valued it too high *mala fides*, and not by error of judgment, they will not disturb the verdict. An agreement by which a third party having no interest in the freehold was to share in the profit and loss of the proceeds of the property insured.

*Held*, not to be such an agreement as to vitiate an insurance by the owner of the freehold.

Writ issued 2nd December, 1857.

Declaration (filed 16th December, 1857) on a policy of insurance dated 19th February, 1856, whereby defendants insured plaintiff against loss or damage by fire to the extent of £400 on the building only of a two-story wooden saw mill worked by water, situated on the west half of lot No. 21, 10th range, township of Royton, county of Shefford, in Lower Canada, £200, and on the machinery £200 from noon on the 16th of February, 1856, to noon 16th of February, 1857: that on 23rd August, 1857, the mill, &c., without any default of plaintiff, was accidentally burnt.

*Pleas*—1st. Denies the destruction of the premises by fire. 2nd. Denies plaintiff's interest in the premises. 3rd. That sixty days had not elapsed between the notice and proof of loss and the commencement of the suit. 4th. That the application for the insurance did not contain a true statement of the facts. 5th. That there was fraud and false swearing in the proof and affidavits of the loss. 6th. That there was no magistrate's certificate. 7th. That plaintiff sustained no loss. 8th. That after the fire the plaintiff assigned the policy without the consent of the defendants. Issued was taken on the 1st, 2nd, 3rd, 4th, 5th, and 7th pleas;

and there was a replication on equitable grounds to the 6th plea: that one Hugh Jameson was jointly interested with plaintiff in the profits of the mill, though plaintiff was the legal owner thereof: that plaintiff resides at Toronto, Upper Canada, and was not at the time of the fire acquainted with any magistrate, &c., contiguous to the place of the fire, and therefore could not *then* produce the certificate: that he represented this to defendants, who by their president and managing director exonerated plaintiff from producing such certificate; but a certificate was prepared under the instructions of such managing director, and was afterwards signed by two magistrates, upon production whereof the president and managing director accepted the same as sufficient. The plaintiff took issue and demurred to the 8th plea.

The case was tried in January last before the *Chief Justice* of Upper Canada, at Toronto. The fire was proved to have taken place about 8 o'clock on Sunday evening, 23rd August, 1857, and the premises were totally destroyed. The plaintiff was proved to be sole owner of the land and mill, the title to him being produced; though in the notice given to the defendants of the loss it was stated that Hugh Jameson had a joint interest with him in the mill; but an agreement was put in between plaintiff and Jameson, dated 1st October, 1855, which shewed that they entered into partnership to carry on the saw mill and lumber business at this mill: "the expenses incurred thereby and profits derived therefrom to be equally borne and shared." The plaintiff lived altogether in Toronto. Hugh Jameson worked the mill, which was erected on a small stream, and could only run a few weeks in the spring and again in the fall of each year. The plaintiff furnished the proofs, &c., of his loss, such as he considered sufficient, by the 24th September, 1857. The evidence of the value of the mill and machinery, both at the date of the policy and at the time of the fire, was very contradictory. The mill was built in 1851, and the builder proved that he got £150 on the contract, and £27 10s. for extra work, the owner furnishing the materials and the machinery also. Some of the plaintiff's witnesses valued it at the time of the loss as high as £600 altogether,

some of the defendants as low as £150, at a cash value ; the whole of this evidence being adduced to sustain or rebut the fraud alleged in the 4th and 5th pleas ; and also, to establish the amount to which the plaintiff was entitled, if the jury found for him. With regard to the magistrate's certificate, the want of which was relied upon by the 6th plea, the plaintiff by one replication asserted it was given ; and by another pleaded on equitable grounds : he set forth that the mill, &c., was under the management of Hugh Jameson, who was a partner of plaintiff's, interested in the profits of the mill, plaintiff being the legal owner : that plaintiff resides at Toronto, and is not known where the mill is situate, and was not at the time of the fire known to any magistrate or notary public, (as in the condition,) and could not produce a certificate in the exact terms of the condition. (See pleadings before.) The 10th condition contained, amongst other things, that " the assured shall procure a certificate under the hand of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss or related to the insured or sufferers) : that he is acquainted with the character of the person or persons insured, and he has made diligent enquiry into the facts set forth in the statement, and knows or verily believes that he, she, or they really and by misfortune and without fraud or evil practice have or hath sustained by such fire, loss and damage, to the amount therein mentioned." The certificate produced was as follows : " Canada East, County of Shefford, to wit : The undersigned justices of the peace for the county of Shefford, are acquainted with the character of Hugh Jameson, one of proprietors of the saw mill situated on lot No. 21, tenth range, township of Roston, county of Shefford, district of Montreal, Canada East. They are also acquainted with the character of Harry Carpenter who had charge of the said mill, and of ———Pinkham, and verily believe their statement is worthy of entire credence. (Signed) John Wood, J. P., S. W. Decker, J. P." To this certificate were annexed the statements of Harry Carpenter and Theodora Pinkham, made on oath, stating the discovery of the fire, and the facts to shew that it was accidental. Hugh Jameson was in



Toronto at the time the fire occurred, and the mill had not been worked for several weeks, and was unoccupied. Carpenter had charge of it, and lived about fifty rods from it. The facts as to plaintiff's residence in Toronto, and consequent inability to procure a certificate in the terms of the condition, were told to the managing director of the defendants, who said plaintiff must get such certificate as he could, and if the board approved of it, it would answer: that the board must determine: that if the claim seemed right in other respect the board were not disposed to make difficulties about mere technicalities. After furnishing the certificate above set forth, the plaintiff was not informed it was insufficient or required to furnish any other. There was evidence that the plaintiff *after* the fire had assigned the policy; the fact of the execution of the assignment was clear; but he insisted it was done subject to be approved by defendants: if not approved by them, it was not intended to take effect.

The learned Chief Justice was of opinion that except the issues on the 4th and 5th pleas, and the 1st issue on the 6th plea, all the issues might properly on the evidence be found for plaintiff.

The question of fraud, as indicated by alleged overvaluation either in the original application, or in the statement of loss, was submitted to the jury. On an objection by the defendant's counsel that the plaintiff was bound by his representation of Jameson being joint owner of the land and mill, the learned Chief Justice ruled, that the deed to plaintiff was the only legal evidence before him of the title, and he stated he thought the evidence entitled the defendants to succeed on the first issue to the sixth plea, and on the issue to the last plea, which, however, he considered was no defence. The jury gave a general verdict for the plaintiff £200 for the mill, and £200 for the machinery.

In Hilary term, *J. Duggan* obtained a rule *nisi* for a new trial for excessive damages, and in that respect contrary to the charge, and also contrary to law and evidence as to the third plea, and the 1st issue on the sixth plea, and the fourth plea, and for misdirection in telling the jury the third plea was sufficiently answered, though sixty days had not elapsed

between the proof of loss and the commencement of the suit, and in directing that the plaintiff could recover for the whole loss, though it appeared he had only a joint interest therein, and in charging that the plaintiff's swearing to the value of the premises as £600 was not evidence of fraud, and that the interest of plaintiff was properly represented in the application for insurance : and also that the weight of evidence was in defendants' favour. He referred to *McFarel v. The Montreal Inland Insurance Company*, 2 U. C. Q. B., 59 ; *Lambton v. The Western Assurance Co.*, 13 U. C. Q. B., 237 ; *Brown et al. v. The Gore District Mutual Insurance Company*, 10 U. C. Q. B., 353 ; *Walroth v. St. Lawrence County Mutual Insurance Co.*, 10 U. C. Q. B. 526 ; and as to the point of plaintiff's interest in the property he referred to *Merrick v. The Provincial Insurance Co.*, 14 U. C. Q. B. 439.

*Eccles*, Q. C., shewed cause, arguing upon the evidence, given, and its bearing on the several issues. He referred to no authorities.

DRAPER, C. J., delivered the judgment of the court.

The first objection taken to the verdict that the damages were excessive rests entirely on an assumption that the jury should have relied on the evidence given for the defendants in preference to that offered for the plaintiff, for there was evidence, if believed, ample to warrant the amount given, and the whole was left, as it was right it should have been, with observations on this point, which the defendants do not complain of, for the jury to decide upon. As to the second plea, I see no ground for holding that there is any thing against the plaintiff's right to recover. The third plea sets up as a defence that sixty days had not elapsed between the giving of the proof of ascertaining the loss, the giving the certificate, and the commencement of the suit. The 11th condition is thus worded : " Payment on losses shall be made in sixty days *after the loss shall have been ascertained and proved.*" No other condition of the policy makes any reference to the period of sixty days. The plea sets this forth as a condition that the loss should not be payable until

after the expiration of sixty days after notice of loss and proof thereof made by plaintiff, in conformity to the conditions of the policy, and the same being provided and ascertained by particulars under oath of any damage done to said property by fire, and likewise the certificate of a magistrate or notary public regarding such fire and the character of the plaintiff. The action was commenced on the 2nd December, 1857. All the proofs and certificates of the magistrate, such as they were, were furnished on the 24th September, 1857, and therefore, unless this plea is to be treated as denying the *sufficiency* of the proofs, &c., and as opening the defence—that the proofs, &c., given were not a compliance with the other conditions, and so no proofs; and so the action is commenced before any proof, &c., and therefore before the lapse of sixty days, the plea fails, and I think it does fail; for I do not think we should treat it, or the 10th clause, as having this scope and meaning, but only as meaning that a lapse of sixty days—after all the proofs are given on which the insured relies as a compliance with the other conditions, must take place before the loss becomes payable. If the proofs, &c., are insufficient, it must be become they do not fulfil other conditions, and that should be directly set up as a defence. I think, therefore, the objection to the direction on the third plea fails, as in fact the sixty days had elapsed according to what I conceive to be the proper construction of that plea. The real question, as was observed by the learned Chief Justice at the trial, comes up on the 4th and 5th pleas, the issues on which involve the question of actual value both at the time of the insurance and of the fire, and the question of *bona fides* in the representation made by the plaintiff, both in his application for insurance, and also in his application for payment of his loss. Now on both these pleas it was expressly left to the jury to say whether there was an overvaluation; and if over, then if it was made *mala fide* for a fraudulent purpose. It was of course possible that the plaintiff might have overvalued his property, and that in the judgment of others it might be worth less, much less than the value he put on it; and yet if such valuation were honestly made it would not avoid the policy, though it

would be a circumstance well calculated to excite enquiry and observation. But the jury have found generally for the plaintiff on both issues. It is not pretended any other evidence can be laid before them, and therefore we cannot properly interfere without we think on the evidence the jury should have come to a different conclusion. I am not by any means satisfied the property is as valuable as was represented, but I cannot take upon myself to say there is such proof of fraud on the plaintiff's part that I ought to decide that the jury have done wrong in acquitting him of it. As to the sixth plea, the defendants should have had a verdict, in my opinion, on the first issue on it, for no such certificate as the conditions of the policy requires was proved; and further, that plea, if sustained, would be a bar to the action. But the second replication on equitable grounds has been found in the plaintiff's favour. The evidence on this point was left to the jury in a manner not objected to at the trial or since: and if that replication contains, as I think it does, enough to displace the defence, and if there was evidence to go to the jury to support it, their finding renders it immaterial, except as a question of costs, that they have improperly determined the first issue on this plea in the plaintiff's favour. The seventh plea raised no question but such as it virtually involved in those which precede it. And as to the eighth, it seems clear to me that it contains no defence, and therefore calls for no observation beyond this, that the jury may have negatived the execution of the assignment as a complete act, and found it to be done contingent on the assent of the defendants.

The only question remaining that requires observation is the complaint of misdirection, in not telling the jury that from the evidence the plaintiff was to be considered as owning only half the property destroyed, and therefore only entitled to recover half its value. As to this, I am of opinion, first, that the evidence shewn the plaintiff was the sole owner of the land, and with it of the mill and machinery; and second, that the argument proved between Jameson and the plaintiff shewed nothing to alter the plaintiff's position in this respect; and, thirdly, that the plaintiff was in no



way estopped from shewing the truth, by the statement contained in the notice of loss furnished by him to the defendants. If the plaintiff was entitled to recover at all, he was solely entitled to recover for the whole loss sustained.

On the whole, I think the rule should be discharged.

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## HATTON V. THE PROVINCIAL INSURANCE COMPANY.

### *Insurance—Conditions.*

*Held*, that the sixty days allowed by the condition endorsed on the policy for the payment of the money does not begin to run till after the insured has given in his proofs of loss, and upon an action brought before the expiration of the sixty days, the plaintiff was nonsuited.

DECLARATION on the policy of insurance for £1000. Insurance from the 3rd of June, 1854, and policy renewed and continued until the 3rd of June, 1858. That whilst the policy was in force, the goods were destroyed by fire, without plaintiff's default; averment of performance of conditions, &c., by plaintiff, and that sixty days had elapsed after due notice and proof of loss, and defendants have not paid the loss. Plaintiff claims £50.

Pleas—1. *Non est factum*. 2. Goods not lost, nor did loss happen in the way plaintiff alleges. 3. Special plea, that the building at the time of the fire was occupied as a tailors' work shop, and tailors' work carried on there; and that millinery work was carried on in part of the building; that one room was occupied as a lawyer's office, another as the office of the clerk of the county court, another as a bed and sleeping room, another as a custom house office, and the third floor of the building used as a masonic lodge room, none of which facts were stated in the application for insurance, or at any time since to defendants, and all of which were material to be stated, as they increased the risk and entitled defendants to a higher premium, and made the risk more hazardous, and the representation of plaintiff thereby false, whereby the policy became void. 4. Plea, as to hazardous trades carried on in the building. 5. Plaintiff effected further assurance of £500 with the Times and Beacon Assurance Company, and the further sum of £500 in the Monarch Insurance Com-

pany, which were subsisting at the time of the loss, without notice to defendants, nor was the same endorsed on the policy, or otherwise acknowledged by defendants, whereby the policy became void. 6. That sixty days had not elapsed after proof of loss, before the commencement of the suit. 7. That the policy became void by the change of occupant of the building by being used as a tailors' shop, milliners' shop, &c., as in the third plea.

Replication, joinder in issue on all the pleas.

The cause was taken down to trial at the last Peterboro' assizes, before *Richards, J.* The plaintiff proved his loss to the satisfaction of the jury, who gave a verdict for him for £1015.

Defendants objected at the trial that no notice had been given them of the additional insurance effected with the Times & Beacon Company, and that if the notice was properly given, it was not endorsed according to the first and sixth conditions of the policy.

2nd. That the action was premature, having been commenced on the 24th of August, 1857, whilst the certificate of the justice of the peace, which was necessary to complete the evidence of loss, was only given on the 30th of June, and received by defendants on the 2nd of July. Plaintiff's own affidavit of loss appears to have been sworn to on the 23rd of June, and is endorsed as received by defendants on the 29th of June, 1857.

Mr. *Eccles* amended at the trial by replying a waiver of the sixty days for payment after proof of loss.

Mr. *Burns*, for defendants, still contended that a waiver could not be set up.

Leave was reserved to defendants to enter a nonsuit on both these grounds, if, on the facts shewn, the court shall be of opinion that the plaintiff is not entitled to recover. The court to be in place of a jury.

By the sixth condition of the policy, it is provided, amongst other things, in case of subsequent insurance on property insured in the company, notice must be given to them with reasonable diligence that such subsequent insurance may be endorsed on the policy subscribed by the com-

pany, or otherwise acknowledged in writing, in default whereof the policy shall thenceforth cease and be of no effect.

By the 10th condition, as soon as may be after a loss the assured are to furnish to the nearest agent or the secretary of the company a statement, under oath, of the particulars of the fire, and a detailed state and account of all damage done. He is also to obtain the usual certificate of a magistrate most contiguous to the place of fire, as to his belief that the assured has sustained loss by fire, by misfortune, and without fraud, &c., to the amount therein mentioned, "and until such proofs and certificates are produced the loss shall not be deemed payable." By the 11th condition, payment on losses shall be made in sixty days after the loss shall have been ascertained and proved, without any declaration whatever.

On the 16th of April, 1857, plaintiff applied to defendants to effect further insurance of £500 on his goods, in addition to the £1000 already insured by them, and in that application in writting made out by their agent and signed by plaintiff, it is stated that other insurances were affected on the property as follows: £500 in the Western, Beacon £1000, and Provincial £1000. This additional assurance of £500 was declined, and after this, on the 3rd of June, defendants renewed the policy for £1000, on which the action was brought, but no endorsement was made on the policy of the additional insurance.

In Michaelmas Term, 1857, *J. Duggan* moved to enter a nonsuit, pursuant to leave reserved, and in the event of the nonsuit being refused, why a new trial should not be had on the grounds reserved, and on the same evidence, and why defendants should not be at liberty to add a plea, as to camphene having been found on the premises, which the judge at *nisi prius* had refused defendants leave to plead, it appearing that this fluid was used for a very short period, and its use had been discontinued for several months before the fire, and why defendants should not be allowed to add a plea that after the loss, and before action brought, plaintiff assigned the policy to John G. Bowes without defendant's consent.

*Eccles*, Q. C., in the following term shewed cause. He

contended that the defendants had waived the delay for sixty days, by stating their intention to contest plaintiff's demand altogether.

DRAPER, C. J., delivered the judgment of the court.

It appears to me only necessary to consider the question whether the action was brought too soon. It is quite clear it was brought before the expiration of sixty days after the loss had been ascertained and proved, and the proofs, declarations, and certificates pointed out in some of the conditions had been produced. Without their production the loss was not to be deemed payable at all; and the postponement of the payment for sixty days following this stipulation, must, we think, on a fair construction of its terms, be held to include all that was previously required.

But it is argued for plaintiff, that the memorandum written and signed by Mr. Dartnell upon the plaintiff's letter of the 21st of August, 1857, sustains the replication of waiver. The memorandum is in these words; "Mr. Hall was written to on the 19th to advise Mr. Hatton that the claim will be resisted."

If the true reading of these conditions be, as I do not doubt it is, that after all proofs, declarations and certificates are given in, the defendants are not liable to be called on to pay until sixty days have expired, then I do not see why the declaration of the defendants, that they intend to resist payment, should be treated as giving a right to demand it before the stipulated time. Suppose a bond given conditioned to pay a sum of money, at the expiration of ten days after the happening of some named event, or a bill of exchange payable at thirty days after sight, the most positive declaration of the obligor or the acceptor, that he meant to dispute his liability, would not render the debt payable a day sooner than was stipulated for by the instrument. The declaration of an intention to dispute the right to recover payment, would not alter the time at which the right would accrue. Waiver more properly means the passing by, or declining, or refusing to accept something at the hands of another, which the party waiving had a strict right to



demand, than a change affecting only an act to be done by the party waiving. Now there is no pretence for saying that the defendants waived the furnishing the requisite proofs, declarations, and certificates; they, obviously not only required them, but were not satisfied with them; and so they had virtually declared. But what they did say in my opinion amounts to this: when the time for payment arrives, we mean to resist it; and I think it amounts to no more.

I think, therefore, the rule to enter a nonsuit should be made absolute.

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### WILLIAMS V. THE SCHOOL TRUSTEES OF SEC. 8, PLYMPTON.

*School site—Statute 13 and 14 Vic., ch. 48.*

#### SPECIAL CASE.

Where a meeting was held to change the site of a school house, and arbitrators appointed who met and decided the question, but their decision was not acted upon, subsequently another meeting was called, and their decision and proceedings were acted upon, and the site changed.

*Held*, that the proceedings were irregular, and that the trustees had not authority to change the site of the school house without the sanction of a special meeting of the freeholders and householders, and that the second meeting had no authority to alter the determinations previously made.

The facts of the case sufficiently appear in the judgment of the court given below.

*S. Richards*, for plaintiff, cited 13 & 14 Vic., ch. 48, sec. 12, sub-sec. 12 also, sec. 11; 16 Vic., ch. 185, sec. 6.

*M. C. Cameron*, contra, contended that section 11 does not apply to an arbitration for changing the site, and trustees might go on calling meetings till they have their own way.

DRAPER, C. J., delivered the judgment of the court.

The material facts of this case are, that the defendants are the school trustees for school section No. 8, in the township of Plympton. That they considered the school house was not in as central a situation as it ought to be; that it was unfit for school purposes, being old and out of repair, and that the title to the land on which it stood was defective. They, therefore, on the 23rd of January, 1857, called a

special school meeting (under 13 & 14 Vic., ch. 48, sec. 12, 12thly) for the selection of a new school site, at which meeting a majority decided against a change. Thereupon the trustees called a second special school meeting to re-consider the question, at which the majority also decided against a change; upon which the trustees stated they would have the question settled by arbitration, under the 11th section of the same act, which provides, "that in case of difference as to the site of a school house between the majority of the trustees of a school section and a majority of the freeholders or householders at a special meeting called for that purpose, each party shall choose one party as arbitrator, and the two arbitrators thus chosen and the local superintendent, or any person appointed by him to act on his behalf, in case of his inability to attend, and a majority of them *shall finally decide the matter.*" An arbitrator was accordingly named by the trustees, one by the freeholders or householders, and the local superintendent himself was the third. The site of the present school house is on No. 24. The local superintendent and the arbitrator for the inhabitants decided against selecting a new site. The other (the trustees') arbitrator was in favour of changing it to No. 23. The trustees being still dissatisfied, applied to the chief superintendent of schools, and by his advice called another special meeting by the following notice: "Notice is hereby given to the freeholders and householders of school section No. 8, in the township of Plympton, that a public meeting will be held at the residence of James Bryson, on Saturday, the 11th day of April, at 2 o'clock P. M., for the purpose of a re-consideration of the school site, dated the 3rd of April, 1857," signed by the three trustees. On the day named, 16 persons assembled at the place named, and the hour having been ascertained by the only two watches there, the meeting was organised, and a resolution passed by a majority of seven authorising the trustees *to select a school site on No. 23*, being in effect the same question which had been submitted to the two previous meetings, and referred to the arbitrators. About a quarter of an hour after this meeting had been dismissed, a number of persons, forming the majority of the

resident freeholders and householders of the section, arrived at the place, and finding that the meeting had been held and dismissed, they protested against the proceedings, alleging that the meeting had been held too soon, that it was then only two o'clock; but they took no other step. Two of the trustees, the third refusing, selected a site for a school house on No. 23, and took a conveyance thereof, and afterwards called on him to join them in accepting the conveyance and taking steps for erecting a school house, but he declined, alleging that the lot on which it was proposed to erect the school house was encumbered by mortgage. Then the two made a contract to build a school house for £95, and about the 31st October last, applied to the third trustee to join in raising the money, which he also refused, whereupon they made a rate bill to raise the money, and attached thereto a warrant under the corporate seal, the third trustee refusing to sign the warrant. The rate bill was correct, if they were legally empowered under the circumstances to make it out and impose the rate. Upon this warrant the collector for the section seized and sold an ox of the plaintiff's, to levy the portion of the tax imposed on him, whereupon the plaintiff brought this action against the trustees as a corporation.

The following questions were raised :

1st. Whether the trustees have the power to build a new school house and impose and collect a rate to meet the expenses thereof, without previously having the sanction of a special meeting for that purpose.

2nd. Whether the notice calling the special meeting for the 11th of April, 1857 was a notice under which that meeting could legally consider and decide the question of a change of school site.

3rd. Whether this action can be maintained so long as said rate bill and warrant remain unimpeached and in force.

4th. Whether said rate bill and warrant are sufficient in law.

*Mr. Richards*, who argued for the defendants, referred us to the statute 13 & 14 Vic., ch. 48, sec. 11 and sec. 12, 12thly, as containing the only enactments bearing on the question. The 6th section of 16 Vic., ch. 185, has, however,

an important bearing on the matter, and the 12th section, 7thly and 9thly, of the 13 & 14 Vic., the Common School Act of 1850, should also be referred to.

It is quite clear that the trustees of a school have no authority to take steps to change the site of a school house without first calling a special meeting of the freeholders and householders of their section. If the majority at this meeting concur with the trustees, or a majority of them, then the matter can proceed, but if not, then a reference must take place under the 11th section of the act of 1850, and the arbitrators, appointed in conformity with that section, "shall finally decide the matter."

The trustees were therefore regular in calling the first special meeting. The majority then assembled differed from the trustees, and that difference left the trustees without authority to make the change they recommended, but it did not prevent further proceedings. The proper step to have been taken was, to have appointed arbitrators. Instead of this, they (irregularly, as I think,) called a second special meeting to *re-consider* the question. I do not find any authority for this proceeding. The result was, however, the same, and no objection being raised, the trustees on one side and the freeholders and householders on the other, appointed each an arbitrator, who, with the local superintendent, gave their decision against the trustees. I am not altogether satisfied, that the arbitrators were properly appointed, because not chosen at the first meeting. But as the 11th section does not, in express terms, require the reference to be made at the meeting where the difference arises, but only prescribes that each party, *i.e.*, the majority of the freeholders and householders, and the trustees, or a majority of them, should respectively name an arbitrator. It may be held, without violence to the letter of the act, that the arbitration was duly gone into. So far as the result of this case is concerned it is not of so much importance, as if they had determined the other way and the trustees had acted on their decision.

Assuming the submissions valid, the statute says the arbitrators are *finally to decide on the matter*. Whether these



words are to be construed as meaning that the question of changing the site of the school house shall never be raised again, I am not called upon to decide. I am not, however, inclined at present to go that length. But I cannot say I have the slightest doubt, that, after the decision of the arbitrators, the same trustees had no power to refer the same question to another special meeting of the freeholders and householders ; in other words, to appeal from an award which is to be final, to a meeting of the same character as that which, as one of the parties, made the reference, and to call a special meeting to *re-consider* the question, which, so far as a special meeting was concerned, had passed to another tribunal specially appointed to dispose of it, is a proceeding so plainly absurd that I am surprised at its being attempted. If the award was valid, the matter, for that year at all events, was, in my opinion, disposed of.

But if the award is invalid, it is only because the second special meeting called to re-consider the determination of the first meeting was irregular and without authority, because, in other words, a special meeting having determined the question upon which it was assembled, no other special meeting can re-consider that determination. It must either be acquiesced in, or be submitted to arbitration. The trustees then are in this dilemma. If the second special meeting was lawful, its determination was lawful also, and as it differed from the opinion of a majority of the trustees, it was referred to arbitration, and the award finally decides the matter. If the second special meeting was unlawful, then the third special meeting called within three months "for the purpose of the re-consideration of the school site," (the question submitted to the first meeting, and re-considered at the second,) must be unlawful also, and then the whole foundation for the imposition of the rate is destroyed. So that the trustees have taken upon themselves to change the site of the school house, either contrary to the decision of a majority of the arbitrators, or if that decision is invalid, they have taken the same step without the consent of a majority of the freeholders and householders at a meeting lawfully empowered to express that consent. Either way their case fails.

I think, therefore, that the trustees had not authority to change the site of the school house (for that is what the first question should be) without the sanction of a special meeting of the freeholders and householders of the section.

I think, secondly, that the meeting of the 11th of April, 1857, called for the purpose of the re-consideration of the school site, had no authority to alter the determination of that question previously made.

I think the rate bill and warrant do not constitute a defence *for the trustees* in this action. Indeed, this question was not argued before us. The defence was rested on the ground of the validity of the proceedings for changing the site of the school house. The powers of the trustees of a school section are much more limited than those of a board of school trustees of cities, &c. The 12th section, 7thly, seems to require a reference to freeholders and householders of the section to determine in what manner the salaries of teachers, "and all other expenses of the schools," shall be provided for, and only gives the trustees power to impose an additional rate for the deficiency, if any. 8thly authorises the trustees to do what they may judge expedient with regard to the building, repairing, renting, &c., the section school house and other matters, but it is silent as to raising money to do any of these things. And 9thly authorises them to apply to the municipality of the township, or "to employ their own lawful authority as they may judge expedient, for the raising and collecting of all sums *authorised in the manner hereinbefore provided* to be collected from the freeholders and householders of the section by rate." It is not stated in the case, nor was it on the argument, under what authority the trustees thought they were acting in imposing a rate to raise £95.

The case is also defective in not stating as a fact, one way or the other, whether the meeting of the 11th of April did proceed to business before the appointed hour. The court will not draw inferences, or determine facts, on a case submitted as this is. The opinion I have formed rests on the grounds wholly independent of what is alleged as having happened on that occasion.

## DEWITT ET UX. V. THOMAS.

*Title—Covenant—Bond.*

The plaintiffs sold defendant a lot of land for £500, the title to which appeared defective in the registry office. On concluding the transaction, the defendant only paid £400, giving his bond, conditioned that if plaintiffs should, within two years from its date, make and complete a good and perfect paper title to the satisfaction of S. B. Freeman, he would pay the other £100. No further title was given, and the plaintiffs brought their action upon the bond, contending that the title, at the time of giving the same, was perfect, and that no detention should have been made.

*Held*, that as the bond was given to cure a supposed defect in the title, which has never been remedied, he could not recover for it; or, in other words, that not having fulfilled the condition of the bond, he could not recover thereon.

DEBT on bond. £200 penalty.

Declaration.—That bond, subject to conditions that if plaintiffs, or either of them, should, within two years from date, “make and complete a good and perfect title to west part of lot No. 5, fifth concession of Barton, in the opinion and to the satisfaction of S. B. Freeman, Esq., of the city of Hamilton, and should convey and assure said land to defendant, his executors, administrators, and assigns, perfectly and unimpeachably, then defendant paid plaintiff £100, with interest at three per cent., in two equal annual instalments, first instalment in three years from date of bond, &c. Averment.—That plaintiff did, before the expiration of two years from the date of the bond, namely, on 1st of March, 1855, make and complete a good and perfect title to said land, in the opinion and to the satisfaction of Mr. Freeman, according to the condition. Breach.—Non-payment of first instalment. There was also a count for the price of land bargained and sold, and for interest.

The defendant cravedoyer, and set out bond and conditions, and pleaded that plaintiff did not, within two years, shew, make and complete a good and perfect title in the opinion and to the satisfaction of S. B. Freeman, nor did they, after making the said bond, convey and assure the land to defendant, perfectly and unimpeachably, according to the conditions—negating the exact words of the condition as set out.

2ndly. That the plaintiffs did not, after making the bond,

convey and assure to the defendant, perfectly and unimpeachably, &c.

3rdly. Never indebted to defendant.

4thly. (To second count). Release by deed.

The plaintiffs took issue, and also replied, on equitable grounds, to the 1st, 2nd, 3rd, and 4th pleas, that, admitting that since the bond was executed, they had not made any further conveyance to defendant, yet that the land was sold for £500, and before the bond was executed the plaintiff did make a good and sufficient conveyance of this land to the defendant and his heirs in fee; and, because of a supposed defect in the title, it was agreed that defendant should, instead of £500, pay £400, and for securing the residue of £100, the deed should be given: that by this conveyance, thus executed, the plaintiffs made a perfect title in the opinion and to the satisfaction of S. B. Freeman, and the land was conveyed perfectly and unimpeachably, and no further conveyance was necessary to complete the title: that the supposed defect was an error, and there was no defect; and that within two years from the making of the bond, Freeman examined and investigated the title, and was satisfied therewith, and decided that the title which defendant took under the conveyance was, in his opinion, a good and perfect title, according to the true intent of the agreement and of the conditions, of which the defendant had notice.

The defendant took issue, and demurred to this replication.

The bond is dated 15th of June, 1853, and recites, that the plaintiffs had sold the land to defendant, at the price of £400; and if plaintiff shall shew, make and complete a perfect paper title to the said land, within two years from the date, conveying and assuring the same to said E. C. Thomas, then that he should pay plaintiffs the further sum of £100.

At the trial, at Hamilton, before *Hagarty*, J., the plaintiffs called on defendants to produce the title deeds, which was refused.

One Rosseau proved that he was present when the conveyance and bond was given: price £500. There was some demur as to title. Defendant said he would pay £400, and,



if the title was made good, in two years he would pay another £100, to be secured by bond.

It was stated, that there ought to be a quit claim from John Dewitt, the plaintiff's brother. The land was Mrs. Dewitt's ; she was the daughter of one Patterson, from the United States ; she has two sisters in Canada, and had brothers. One Durham was reputed the patentee of the Crown. Witness heard that Durham and Patterson (Mrs. Dewitt's father) had made a bargain about the land : could not say when Patterson died : though Mrs. Dewitt got the property, in 1815, from Durham ; heard her say her father was then dead ; saw the deeds ; she took possession in 1815, and lived there to the time of sale. At the sale to defendant a will was produced and spoken of. It was then handed to witness from defendant's custody. It appeared to be dated in 1807 ; and substantially, after his wife's life estate, he deeded his land to be sold, and every child to share equally, "in Canada and this state." In 1816, or 1815, the plaintiffs had made a deed of the whole lot to John Dewitt. The deed was reputed bad, as she had not been examined according to law. Patterson left Canada about 1812. One of his sons brought an action some years ago for part of the lot, and tried to make himself heir. Thought all the children were born in the United States. John Dewitt left Canada in 1824. He once lived on a corner of the lot (not the part now in question), in 1816, for about a year. The plaintiffs were in possession five or six years before he left. He had lived close by till he went. It had been agreed between Mrs. Dewitt and her sisters that she should get the deed from Durham in her own name, and settle with them for their shares. A receipt of Rachael Luckman, dated 1817, of all her share in her father's estate was put in. Mrs. Shules, another sister, had been settled with in May, 1853 ; but this was in consequence of another claim made by her, as plaintiff had settled with her at an early day.

A receipt, under seal from John Dewitt, of £50, to Philip Dewitt in full of all demands on lot No. 5, fifth concession of Barton, was put in : no date. Witness thinks this was a document he had seen in 1817-18 or 19. Thought plaintiffs were then in possession.

There had been a previous negotiation between the parties for this land, which was broken off. Was present at a meeting in November, 1853. John Dewitt had just come in. Defendant said, "Well, you see the title can't be cleared up." No papers were then signed.

On the back of the defendant's bond was this memorandum: "I am of opinion that the title within mentioned is good, within the meaning of the within reference. I made up my mind to this more than a year ago. 23rd June, 1856. Signed, S. B. Freeman."

Mr. Freeman deposed, that when John Dewitt came from the United States he wanted \$100 for his claim, and after hearing his statement witness came to the conclusion that he had no claim worth paying 100 cents for, and that he told the parties so; witness could not remember if the will was produced; may have been as Rousseau stated; remembers no other difficulty except as to J. Dewitt. Presumes that he was brought to witness to make deed, if necessary; can't say if it was on his receipt he decided; perhaps it was; perhaps on length of possession; did not search registry; defendant agreed with witness as to J. Dewitt having no claims; thinks he agreed with his partner, Mr. Craigie, that title was defective; defendant had little fear of disturbance, but title unmarketable; looks at memorial produced of deed from plaintiffs to John Dewitt; can't say that in January, 1853, title was unimpeachable; can't say if attention was drawn to this deed defendant objected to title as unmarketable.

On the defence Mr. Craigie proved that he examined the title in 1853. Parties had a prior negotiation that failed; he and Mr. Freeman advised that the title was bad. The first agreement was in writing: this fell through. Is witness to the bond; remembers that his chief objection was the claims of the sisters; it was this consideration that something more had to be done to perfect the title, and a further conveyance from supposed claimants; this was what was referred to Freeman to settle thereafter to his satisfaction. He thus considered the title imperfect. There were persons from whom witness thought releases were to be obtained; was not present when Freeman afterwards decided

the matter; thinks the parties contemplated future deeds, and that Freeman would consider it necessary; witness considered the title defective, and would not advise defendant to take it. Does not remember as to J. Dewitt's claim; searched registry; the registrar produced an original memorial of deed dated 1st October, 1817, from plaintiffs to John Dewitt in fee of this lot; registered by grantee 11 March, 1819; nothing said as to wife being examined.

The judge looked upon the case as one of legal deductions upon the evidence on the issues raised. At the request of defendant the jury were asked if Mr. Freeman, when he wrote his approval on the bond, had all the facts brought before him, or did he pronounce merely on one part of the case; for example, J. Dewitt's claim. The judge's view of the case was strongly against the plaintiff, but he left this point to the jury. They found that Freeman had all the facts before him when he decided.

It was agreed that a verdict should be entered for the plaintiffs for £200 penalty, and damages assessed on breach £55 15s. 10d., with leave to defendants to move to enter a nonsuit on the evidence and on this finding of the jury, which was to settle that point in the case.

In Michaelmas Term, Dr. *Connor*, Q. C., moved accordingly, and in Hilary term, *O'Reilly*, Q. C., shewed cause, citing *Wood v. Dwarries*, 11 Ex. 493.

*Connor*, in reply, cited *Reis v. Scottish Equitable Co.*, 3 Jur. N.S. 417, and contended that as plaintiff had proceeded on a legal title, he cannot after plea shewing a legal defence, assert that his claim is merely an equitable one; that parties originally *agreed* that the title was bad, and nothing had been done to cure it; that defendant's contract was to pay £400 for title as it was, and an additional £100 if the defects were removed.

Both parties on argument referred to a certificate of registration against the land, now among the papers in the record.

By this it further appeared that John Dewitt mortgaged the land to S. Andrews by deed, of which date not given, but registered 18th May, 1821, and a quit claim from

Andrews back to J. Dewitt. dated 24th November, 1827, was registered 14th July, 1828.

HAGARTY, J.—We do not see how the plaintiffs can succeed in this action on the bond. The plea traversing the exact words of the conditions, “that plaintiffs did not within two years shew, make, and complete a good and perfect title in the opinion, and to the satisfaction of S. B. Freeman, nor did they, after making such bond, convey and assure the land to defendant perfectly and unimpeachably, according to said conditions.” The recitals in the bond expressly shew that a good *paper* title was to be given to the defendant.

We do not see that the replication on equitable grounds displaces the defence thus pleaded, even if such a use can be made of the provisions of the Common Law Procedure Act permitting such a mode of reply. The replication clearly shows that the plaintiffs have no action at law on the bond, having never in any way fulfilled its conditions; but they seek to make a new case for equitable relief wholly apart from the bond and its conditions, on the original bargain between the parties on the sale of the land. The plaintiffs in effect aver that the giving of the bond was an erroneous and unnecessary proceeding, arising from a mistake in assuming the title to be defective, when in truth it was unimpeachable. We do not see how an action can be maintained on the instruments, if the replication be true.

This would be an application of the new principle of equitable replications for which we are not prepared.

We cannot accede to the view suggested by plaintiff's that the agreement was in fact that the judgment of Mr. Freeman was to be decisive of the title, and that his approval of it without any further act done or blot removed, would be a fulfilment of the conditions of the bond. The language used does not, in our view, admit so narrow a construction. If the plaintiffs be allowed to abandon the bond, and, admitting the nonfulfilment of its conditions, fall back on what they call the true position of the parties and the real transaction between them, the case would in their view seem to amount to this. The land was sold for £500; £400 was paid on



account, and it was agreed that the remaining £100 be retained till certain supposed defects were remedied ; no such defects really existed, and the money retained should now be paid. This would place the parties somewhat in the position of vendor and vendee in a suit by former against latter for specific performance of a contract of sale of land. The vendee resists on objections to the title, and the usual enquiry takes place. The plaintiffs cannot be placed in a more favourable position than if they had let vendee into possession on payment of four-fifths of the purchase money, and an agreement to pay the remaining one-fifth when the defects were cleared up. The plaintiff urges: " You have gone into possession, you have a conveyance of the land, which we insist vests in you an unimpeachable estate, and you insist on holding it without paying the stipulated price ; and in this respect it differs from the ordinary case, where a title is forced on an unwilling purchaser, as you keep the estate, and will not pay the full value."

The defendant says: " I was willing to pay and did pay £400 for the title *as it was*, and if plaintiffs will clear up certain blots, I am ready to pay another £100. If I was now made to pay the £100, leaving these defects just as they were, I do not get that title for which I bargained, and I am made to pay £500 for what I agreed should be given to me for £400 ; and I refer to recital in bond to prove that I desired and was to get a good paper title."

On examining how far these statements on either side are borne out by the evidence, we find the words of the bond expressly affirming the defendant's view of the true nature of the bargain, and the title is found in an unsatisfactory position. On the registry the paper title is clearly defective ; the plaintiffs appear to have conveyed (at least the memorial produced would so import) to John Dewitt in 1817 ; no re-conveyance appears from him ; but he is found mortgaging the property in 1821, and taking a quit claim from the mortgagee in 1827. The plaintiffs appear to have given him £50 for his interest many years ago, according to a receipt produced, which certainly would not pass the estate, and, as their witness Rousseau alleges, at a date prior to the mort-

gage registered in 1821 from John Dewitt to Andrews. The plaintiffs rely on a possession almost reaching to 40 years, as giving them a complete title. It may be that neither they or their vendee can ever be disturbed ; but the defects in the paper title were as apparent that we can readily understand the purchaser insisting on retaining £100 till they were removed.

The claims of the other members of the Paterson family were also regarded with apparent apprehension ; and although not so important as the state of the registered title, they would probably be regarded by careful conveyancers as objections requiring satisfactory explanation and removal. A purchaser with notice of their existence might reasonably desire some protection against the chances of being harassed by their possible revival.

It is impossible that titles depending wholly on the Statute of Limitations are generally satisfactory to purchasers. Men may risk their sufficiency if they desire the estate merely for personal occupations, but for the purpose of resale few give any thing like the price which a clear paper title would secure for the same property.

There are many cases in which a title depending on the Statute of Limitations has been forced on unwilling purchasers ; they are noticed in Sugden's V. & P., (1856,) page 324 ; but it is not necessary to consider this case in that light alone.

The general view of the principles that guide courts of equity in forcing titles on purchasers, is set forth with great clearness in a judgment of *Sir George J. Turner* (10 Hare 1, *Pyrke v. Waddingham*) reviewing most of the previous cases. The court in this case was in favor of the title, but declined decreeing specific performance, adding, "It is the duty of the court not to have regard to its own opinion only, but to take into account what the opinions of other competent persons may be. If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser or the court has the means of satisfactorily investigating, specific performance is to be refused." "The court has no means of treating the question as against adverse claimants, or of

indemnifying the purchaser if its own opinions should ultimately turn out not to be well founded."

At page 333 of the treatise above quoted, Lord *St. Leonards* mentions the difference that exists between a court of equity forcing a title on an unwilling party, and a court of law," when the only question is whether the title is good or bad." He adds, "The legislature has set this point at rest by enacting that equitable defences may be expressly made at law, but the plaintiff may reply facts which avoid the defence on equitable grounds, and if the court or judge think that the equitable jurisdiction cannot be dealt with by a court of law so as to do justice, the equitable plea or replication may be struck out on such terms as may seem reasonable."

The intelligible ground on which the case should be decided in favour of the defendant is simply this: that by the express terms of the bond sued upon the defendant contracted for a property at a price of £400: that certain defects existed, which the vendor contracted to remove within a given time, and that thereupon the defendant agreed to pay further sum of £100: that the value which defendant expected to get for the additional £100, and which plaintiff agreed to give him, was a good paper title: that these defects have never been removed, but exist now as then; and consequently, that to compel defendant to pay the £100 agreed to be given expressly to insure the removal of these objections to the title, would be to make a new contract for the parties.

We consider that this should be the result to be arrived at, although it is possible that on an ordinary contract of sale a court of equity might compel an unwilling purchaser to accept a title depending on the Statute of Limitations.

DRAPER, C. J.—I desire only to add two observations to the judgment of the court as delivered by my brother *Hagarty*—1st. As to the effect of the recital limiting the operative portions of a deed, I refer to *In re Hugh Neal's trusts* before V. C. Sir *W. P. Wood* (4 Ju. N. S. p. 6), which illustrates and confirms the principle; and 2nd, as to the effect of an equitable application. Its proper operation I take to be, to

displace the effect of a plea which contains a strictly legal answer, to a legal cause of action. But that it cannot operate so as to alter the legal character of the cause of action in the declaration, and to give the plaintiff a right to recover, by shewing an equitable right to recover, which in the declaration is claimed as a legal right. If the whole right to recover rests upon equitable and not upon legal grounds, the plaintiff must go, as I apprehend, into the court of equity to enforce it.

Rule absolute to enter nonsuit, the plaintiff abandoning his demurrer.

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# DIGEST

OF

CASES REPORTED IN VOL. VII., BEGINNING EASTER TERM, 20 VIC., ENDING HILARY TERM, 21 VIC.

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## ABANDONMENT.

See POLICY, 3.

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## ACCEPTANCE.

See BILL, 2.

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## ACCORD.

*And Satisfaction.*]—See PLEADING, I.

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## ACTION.

See STATEMENT.

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## ADMINISTRATION.

*Personalty---Administration.*]—The law of England as to granting probate or committing letters of administration is the law to be administered by our probate and surrogate courts. Where a party domiciled in the state of New York died suddenly *in itinere* in the County of Wentworth in this province, having trifling personal effects about of a less value than £5. *Held*, that the surrogate court of Wentworth had jurisdiction to grant administration of his effects. Such administration should be granted by the surrogate court only to an inhabitant of the pro-

vince. *Grant, Administratrix, &c., v. The Great Western Railway Company*, 438.

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## ADMISSIONS.

See EVIDENCE, I.

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## AFFIDAVIT.

See CHATTEL MORTGAGE.

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1. *Title of Cause.*]—Where the title of the cause had been reversed by placing the defendant's name before the plaintiff's, the court refused to receive them. *Wright et al. v. Jennings*, 26.

2. *Evidence.*]—On a question of whether a note of £50 and a charge for a similar amount were the same the jury having found for the plaintiffs; on an application for a new trial being made upon affidavits, and the defendant not swearing that he could produce new evidence—Rule discharged. *Bates v. Chisholm*, 46.

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## AGENT.

See PRINCIPAL.

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*Liability of—Insurance.*]—The defendant, at Hamilton, having undertaken on behalf of the plaintiffs, at Montreal, the disposal of

certain teas belonging to the latter, and not having succeeded, were directed by them to return the teas to Montreal. The defendants caused the teas to be shipped on board a steamboat bound for Montreal (without effecting any insurance thereon,) which was lost on her voyage, but the defendants did not advise the plaintiffs of such shipment till after the goods had been lost. *Held*, under the circumstances of the case, that the defendants incurred no legal liability to damages for not having given the plaintiff earlier advice, and so as to enable them to have insured the teas. *Maitland v. Tylee*, 335.

### AGREEMENT.

*Breach of.*]—*See* REPLEVIN, 4.

#### 1. *Under seal—Parol discharged.*]

—Action to recover back the purchase money paid by plaintiff for two years' profits of certain mining shares under a sealed agreement on the allegation that before the two years had expired the defendant had sold the shares, and that the consideration had failed. Plea, that such shares had become valueless and unproductive of profit, and that the act of selling was in fact at the plaintiff's parol request, and for his benefit. *Held* good on demurrer, the action not resting on any direct branch in the sealed agreement. *Sanders v. Baby*, 252.

2. *Mutuality.*]—The plaintiff entered into an agreement with defendant's wife. The defendant with whom he had left some promissory notes for collection, should maintain him free of charge for the remainder of his life, and have estate and effects upon his decease. Upon an action brought for money had and received, the learned judge

ruled that there was no mutuality, as the defendant could not have been bound to maintain the plaintiff. The jury having found for the plaintiff, the court upheld the verdict. *Bush v. Abel*, 499.

### ALIEN.

*See* DOWER, 4.

### AMENDMENT.

*See* DOWER, 2.

### APPEAL.

*Criminal--Conviction.*]—The defendant was convicted before the mayor of breaking a town by-law, and appealed to the quarter sessions, where the conviction was upheld. A motion was then made against the indictment in this court, which was brought up by *certiorari*; and the conviction was again upheld. *Quære* as to the right of appeal from the quarter sessions. *The Queen v. Watson*, 495.

### APPLICATION.

*To quash By-law*—*See* BY-LAW.

### ARBITRATION.

(*Under School Act.*)

*See* REPLEVIN, 5.

### ARREST.

*See* COMMON LAW PROCEDURE ACT, 3.

1. *Bail—Sheriff.*]—The provisions of the 10 & 11 Vic., ch. 15, sec. 5, as to gaol limits apply to cases in which county courts *ca. sas.* are issued under 14 & 15 Vic., ch.

52, to the sheriffs of other counties than that in which judgment has been obtained; when, therefore, the bond to the sheriff, authorized by 16 Vic., ch. 176, sec. 7, had been given, and the justification, the filing and county court clerk's certificate had been obtained in the court of the county where the arrest had been made, and not in the county of B from the court of which the *ca. sa.* had been issued, the proceedings were held to be regular, and the sheriff discharged. *Gibson v. Thomas, Sheriff*, 163.

2. *Bail—Insolvent act*] -- The defendant B. having been arrested, gave bail—a verdict was rendered against him in the suit—and a *ca. sa.* issued, which was returned “*non est inventus*,” a writ of summons was then issued on the recognizance against Jones, his surety, but prior to the service upon J., the defendant B. applied under the statute 19 Vic., ch. 93, as an insolvent debtor (to the judge of the county court of York and Peel), and on the 16th February, obtained the interim order to protect him from arrest; on the 17th of February the defendant J. was served. It was contended that the *ca. sa.*, having been received and the return made after the interim order, the bail were not fixed by the return of “*non est inventus*.” *Held*, that under the circumstances the bail was liable. *Ross et al. v. Brooks et al.*, 366.

## ASSAULT.

*And Battery.*]—See TRESPASS, 3.

*Constable.*]—Where the judge at *nisi prius* left it to the jury to say whether a constable who had arrested a man without a warrant, acted under a fair and reasonable supposition that he was performing a

public duty, telling them at the same time his own impressions as to the evidence, and the jury found in accordance with his views as expressed. *Held*, that the case was properly left to the jury, and the verdict was sustained. *Cottrel v. Hueston*, 277.

## ASSESSMENT.

*Of Damages.*]—See PLEA.

## ASSIGNMENT.

See INVENTORY.

*Of Debt—Notice of.*]—See ORDER.  
*New.*]—See TRIAL, 2.

## ATTACHMENT.

*Writ of—Effect of final Order for protection from process—Set-off.*] -- C., one of the obligees, in a bond of indemnity given to the sheriff under a writ of attachment against the goods of an absconding debtor, filed his petition for protection from process and afterwards obtained a final order thereon. Judgment was obtained in an action against the sheriff subsequently to the filing of the petition and the bond, but was not referred to in C's. schedule thereto. *Held*, that the sum recoverable by the sheriff upon such bond was not a “debt contracted payable on a contingency,” or a “liability,” under 19 & 20 Vic., ch. 93, from which C. was discharged by such final order. *Held*, also, that the obligees in such bond were not entitled to set off against the sheriff's claim money the proceeds of the sale under the attachment to pay certain executions placed in the hands prior to such attachment. *Moody, Sheriff, v. Bull et al.*, 15.

## AWARD.

*Motion to set aside.*] -- When arbitrators met and two of them agreed upon an amount to be awarded, and told the third (who dissented therefrom) that it was their intention to award this amount, and afterwards, in the absence of the third arbitrator and without notice to him the other two increased the award; and the objection being that the same two arbitrators took evidence secretly and without notice to the third, the substance of which was, that they went to see a mill at the urgent request of defendant, but during his absence. *Held*, that the facts as stated shewed sufficient ground to refer the case back to the arbitrators, but the defendant not wishing that, the facts *held* not sufficient to set aside the award in toto. *Held* also, that the fact of one of the arbitrators being a creditor of one of the parties to the suit is not sufficient to make an award invalid. *Hall v. Wilson*, 272.

## BAIL.

See ARREST, I & 2.

## BATTERY.

See TRESPASS, 3.

## BILL.

1. *Of sale.*—*Evidence of loss.*—*Search.*]—*Held*, that evidence by plaintiff and wife of a search for and the loss of a bill of sale, under which the judge ruled he must prove property, was insufficient to let in secondary evidence of the contents of such bill of sale. *Bratt v. Lee*, 280.

2. *Of exchange.*—*Notice.*—*Acceptance*]—Defendant C. had drawn a bill on one S.C., in England, who

had no effects, and did not accept, and the bill was protested for non-acceptance and non-payment. Defendant B. was an endorser for the drawer's accommodation. Notices of non-acceptance and non-payment were duly given to the drawer but notice of non-payment only to the endorser B., who repudiated the liability. *Held*, that B. was discharged by the want of notice of non-acceptance, and that the facts of there having been no effects in the hands of the drawer, and of B. having endorsed for accommodation, made no difference. *The Gore Bank v. Craig et al.*, 344.

## BOND.

See TITLE.

*Subject matter of.*—*Nonsuit.*]—The plaintiff took a bond from the defendants for £1,000 conditional for the faithful performance by one H. V. Deming of his duties as agent and clerk of the plaintiff in a store to be opened by Deming for the plaintiff at L. Subsequently the plaintiff sold to H. V. D. the goods, &c., at L., being the subject matter for which the bond was given without the consent of the sureties. *Held*, that the bond was thereby avoided. The plaintiff may take a nonsuit at any time before the pronouncing of the verdict by the jury; but not afterwards. *Van Allan v. Wigle et al.*, 459.

## BOUNDARY.

See TRESPASS, 2.—EJECTMENT, 4.

*Lines.*]—On an ejectment to recover part of a lot on the 1st concession of Thurlow, it appeared on Quebec map that the road in front of the 1st concession was marked out from one end of the township to the other, but no original monument could be found further east



than the south-east angle of lot 13. The defendant, in 1835, had received instructions for the survey of an Indian reserve of lots 28, 29, 30, & 31, on the broken front on the bay of Quinte, and to run the lines thereof butting their rear on the 1st concession, and this was the first survey on the ground. In 1841 the boundary line commissioners made an award as to the broken front, and ordered stone boundaries to be entered where the defendant had planted posts "on the rear of the Indian reserves, and in front of lots 28, 29, 30, & 31, in the 1st concession." It was *held* on the evidence that the plaintiff could not draw a side line between lots 27 and 28, commencing at the post planted in *front* of the *broken front* in preference to the one deduced from the monuments on the road in front of the 1st concession. *Vivian v. Campbell*, 175.

#### BY-LAW.

*See* MUNICIPAL, 2.

*Application to quash.*]—This was a by-law passed to raise a loan of money for the construction of an esplanade under 20 Vic., ch. 80, which authorises the city to *raise a loan for such an amount not exceeding £75,000*, as may be necessary, &c. The by-law past thereunder held bad, and quashed upon the ground that while it authorised the raising of a loan to the full extent of £75,000, it did not shew that that sum was necessary, nor does it shew for what amount the contractors had engaged to do the work.—*Ex parte Hayes v. The City of Toronto*, 255.

#### CA. SA.

*See* COM. LAW PROCEDURE ACT, 3.

### CARRIERS.

*See* SHIPPING AGENTS.

*Common*]—*See* "RAILWAY."

1. *Common—Railway Company—Liability as such*].—The declaration alleges that plaintiff caused to be delivered to defendants as common carriers, two cases and one bale of goods, value £150 7s 4d to be safely conveyed from the Suspension Bridge to Toronto, within a reasonable time for certain hire. Breach, that defendants did not, within such reasonable time, take care of and convey the said goods to Toronto, and never delivered the same. Plaintiff, on the 24th of July, 1856, received a notice that "the undermentioned goods consigned to you have arrived here this day, we will thank you to send for them as soon as possible, as they remain here at your risk and expense." The goods were spring goods, which had arrived at the Suspension Bridge on the 5th of April, and on the 11th of March, and being unseasonable at the time of receipt of notice, plaintiff refused to take them. *Held* that the goods being bonded goods, subject to duty, and defendants having conveyed them within a reasonable time to their place of destination, they were *not bound* to give notice of their arrival there, and their duty as common carriers had ceased. The decision in *Bowie v. The B.B. & G. Railway Company*, confirmed. *O'Neil v. The Great Western Railway Company*, 203.

2. *Fire*.—The defendants as common carriers undertook to carry goods of the plaintiff, who resided at Port Dover, from Buffalo to Caledonia, whence plaintiff was to take them. Upon their arrival at the Caledonia station, the customs duties not having been

paid, and no one being in readiness to receive them, they were placed in a bonded warehouse, and whilst there were destroyed by fire. *Held* that the defendants were not liable for the loss, and that their duty as common carriers was ended on the deposit of the goods in the bonded warehouse. The principle decided in the case of *O'Neill v. The Great Western Railway Company*, 7 U. C. C. P., affirmed. *Inman v. The Buffalo & Lake Huron Railway Company*, 325.

3. *Free Tickets.—Damages.*]—The defendants gave a free ticket for the year 1857 over their railway in these words, "Pass Captain James Sutherland free between any station and any station, from the 1st of January, 1857, to 31st December, 1857. This ticket is not transferrable, and the person accepting it assumes the risk of accidents and damage." Captain Sutherland was killed while passing over the railway from the giving way of a bridge over the Desjardins canal, and his administrator brought an action for damages under 10 & 11 Vic. ch. 6. *Held*, that the defendants were authorised to enter into a special contract and were not liable for damage or injury arising to the party holding such a ticket while travelling under it. *Sutherland v. The Great Western Railway Company*, 409.

### CHANGE.

*Of possession.*]—See POSSESSION.

### CHATTEL.

*Mortgage*]—See PROMISSORY NOTES

*Mortgage—Affidavit—Furat*]—The words "sworn and affirmed," without saying which of the two deponents swore, and which affirmed, and omitting the word several-

ly in the affidavit to a chattel mortgage. *Held* sufficient. It is not necessary in affidavits sworn under a statute to conform to a technicalities required by rules of court. *Moyer et al., v. Davidson et al.*, 521.

### COLLECTOR.

See TAXES.

### COMMISSION.

*Nonsuit—Evidence.*]—This was an action on a promissory note; defendant Strong, the first endorser, let judgment go by default. Phipps, the second endorser, pleaded did not endorse. The evidence as to the endorsement by Phipps was conflicting, but a commission upon which witnesses had been examined, and among others, the makers of the note, on being opened, was found to be informal and could not be read. The plaintiffs, notwithstanding, preferred going to the jury to taking a nonsuit. Under the circumstances the court discharged a rule *nisi* for a new trial, which had been granted on the law and weight of evidence. *The City Bank, v. Strong and Phipps*, 96.

### COMMON LAW PROCEDURE ACT.

1. *Mill dam—Obstruction of water course.*]—The defendant had built a mill and run it for upwards of twenty years, damming the water back a certain height by means of a log, some slabs and earth. Within twenty years the plaintiff built a mill lower down the river. Lately the defendant erected an earthen dam three or four feet higher than the first. And the complaint made is, that defendant, in erecting the last dam, had pressed back the water to a greater ex-

tent than his twenty years' use of the former dam entitled him to do; the plaintiff admitting that he was entitled to a certain height of water by virtue of twenty years' and upwards use. The declaration was framed according to the form in the Common Law Procedure Act. *Held*, that the plaintiff should have founded his right on the possession of the land, and not of the mill, and that the form given in the Common Law Procedure Act is applicable only when the evidence will sustain the claim in that form. *Tucker v. Paren*, 269.

2. *Notice of title—Ejectment*]—The notice of title required by the 222nd section of the C. L. P. Act confines the claimant to proof of the title therein stated, but leaves him at liberty to defeat by any means in his power the title set up by the defendant, and in like manner the defendant is confined to proof of the title claimed by his notice, but is equally at liberty to defeat (and that without going into his own title) the title set up by the plaintiff. When, therefore, the plaintiffs, claiming by their notice under a grant from the Crown, had put in evidence of such grant, it was competent for the defendant, notwithstanding he had given a notice, claiming a title in himself, as derived from one A. under a lease from the plaintiffs, to rely upon proof of such lease alone as defeating the plaintiff's title, without proving an assignment to himself. *The Canada Company v. Weir*, 341.

3. *Arrest—Ca. Sa.*]—When a capias had been issued, but the defendant was not arrested thereon, and after judgment obtained, the plaintiffs upon the same affidavit issued a *ca. sa.* and arrested the defendant. *Held*, that the proceed-

ings were irregular and should be set aside. The affidavit must relate to the present belief of the party making it, and must therefore be sworn at the time of issuing the writ. *Moss et al., v. Reid*, 429.

## COMMON COUNTS.

See CONTRACT 3.

## COMPANY.

*Railway.*]—See RAILWAY.

*Road.*]—See ROAD.

*Joint Stock—Liability of individual members of, under 16 Vic., ch. 191.*]—On *sci. fa.* to render liable for the debts of the company, the individual members of a company formed under the 16 Vic., ch. 191, intituled, "An act to authorise the formation of joint stock companies to construct works necessary to facilitate the transmission of timber down the rivers and streams in Upper Canada." *Held*, that in the absence of any express provision in such act, they are not so liable, and even if they were, *quære* whether they would not have been exempted by the operation of 12 Vic., ch. 10, sec. 5, sub-sec. 24. *Emerson v. Flint*, 161.

## CONDITION PRECEDENT.

See DEMURER, 1.

## CONDITIONS.

See INSURANCE, 3.—POLICY, 1, 2.

## CONSIDERATION.

See PLEADING, 2.

*Consideration.*]—A deposit of a sum of money by the plaintiff in the hands of a third party for a limited time, during which the defendants would ascertain facts. *Held*, sufficient consideration to support a promise or agreement



by the defendants to delay entering a judgment and issuing execution. *Reed v. Carrall et al.* 283.

## CONSTABLE.

See ASSAULT.

## CONTRACT.

1. *Breach of--Damages--Statute of frauds.*]—On an action for breach of contract and £50 damages, the court granted a new trial on payment of costs, one of the defendants having expressly denied the contract by affidavit. *Held*, that the acceptance of part of the goods sold and actual receipt thereof need not be simultaneous to support an action upon a verbal contract. *Morse v. Chisholm et al.* 131.

2. *Special—damages.*]—Where work was to be done (under a special agreement) to the satisfaction of a surveyor, and the jury, notwithstanding a certificate of the surveyor was not produced, gave a verdict for the plaintiffs. It was set aside. *Coatsworth v. The City of Toronto*, 490.

3. *Special—damages—Common counts*]—The plaintiff entered into an agreement (not sealed by defendant) for the performance of certain work at specified prices, with a condition that the defendants should have the right of stopping the work at any time, paying plaintiff for the damage thereby occasioned. Detentions were made, which the company's engineer swore were allowed for in the estimates and certificates. The plaintiff also sued on the common counts. At the trial defendant's counsel contended (successfully) that the plaintiff could not recover under the special contract. Each item was left specifically to the jury, who found for the plaintiffs,

for the demurrage, irrespective of other claims, on a motion for a new trial on the law, evidence and misdirection. *Held*, that the defendants having denied the contract upon which the plaintiff's first count was based, could not invoke its aid to defeat the plaintiff's claim upon the common counts. A new trial was, however, granted on payment of costs, on the ground of excessive damages. *Stock v. The Great Western Railway Company*, 526.

## CONTRACTOR.

*Personally liable*—For obstruction of road.—See OBSTRUCTION.

## CONVICTION.

See APPEAL.

## COSTS.

See COVENANT I.—LACHES, I.

*Final judgment—Outer County.*]—In an action brought against a road company for having so constructed their road as to obstruct a flow of water from plaintiff's lands, the plea of not guilty by statute, *held* not to bring the title to the land in question under the county court, or division court acts, so as to entitle the plaintiff to tax superior court costs without a judge's order. Where all the proceedings in an action previous to final judgment have been taken in the deputy's office in an outer county, a judgment signed and taxation of costs in the principal office in Toronto *held* not irregular. *Overholt v. The Paris and Dundas Road Company*, 293.

## COUNTY.

*Outer.*]—See COSTS.



COURT HOUSE.

*Custody of.*]—See EJECTMENT, 2.

*Municipal Council.*—The plaintiff brought an action for the use and occupation of a room in his hotel as a court room, and proved that the sheriff of the county had engaged the room, and that the chairman of the municipal council had signed an order for the payment of his charges. *Held*, not recoverable. *Dark v. The Municipal Council of Huron and Bruce*, 378.

. COVENANT.

See TITLE.

1. *For good title.*—Measure of damages—Costs]—In an action by a purchaser, who had been ejected, against his vendor upon his covenant for a good title. *Held*, that the plaintiff might recover as damages the costs of the ejectment brought against him, which he had defended (even though he had not actually paid them) in addition to the purchase money and interest. *Stubbs v. Martindale*, 52.

2. *Absolute—Title*]—*Held*, that a party giving an absolute covenant in a conveyance of real estate, and a bond conditioned that it should be void upon payment of a certain mortgage for £75 upon the land conveyed, is liable thereon, although no legal proceedings may have been taken upon the mortgage by which the party is demised. *Carlisle v. Orde*, 456.

3. *Usual—County register—Evidence*—"Usual covenants" in a conveyance to a purchaser extend only to the acts of the vendor, if he have been himself a purchaser for valuable consideration, if he take by descent to the acts of himself and his ancestors, and if he take by devise to the acts of himself

and his devisor. A certificate purporting to shew the registered conveyance of land from the county registrar's office under the hand of the deputy registrar, held not admissible evidence of title under the 13 and 14 Vic., ch. 19, sec. 4. *Gamble v. McKay*, 319.

CRIMINAL.

*Appeal.*]—See APPEAL.

CROWN.

*Survey.*]—See SURVEY.

*Grant.*]—See TRESPASS, 1.

DAMAGES.

See REPLEVIN, 3.—CONTRACT, 1, 2 & 3.—WARRANTY.—MORTGAGE, 1.—CARRIERS, 3.—COVENANT, 1. *Assessment of.*—See PLEA.

1. *Measure of.*]—The plaintiff, a ship owner, having been induced by the defendants' error in the transmission of a message, to suppose he could obtain a cargo of 8,000 instead of 3,000 bushels of wheat from Chatham to Oswego, abandoned a contract for a cargo from Detroit, and sent his vessel to Chatham, whence it sailed with a cargo of 3,000 bushels only. *Held*, that the damages which naturally resulted from the defendants' breach of duty were the expenses of sending the vessel to Chatham and back, and that the plaintiff was not entitled to claim the profit he might have made from carrying the 8,000 bushels. *Lane v. The Montreal Telegraph Company*, 23.

2. *Excessive.*]—The court will not ordinarily interfere with the amount of the verdict given by a jury, unless the damages are manifestly extravagant, or unless some wrong element has been admitted in the computation of them, or there is reason to attribute partial-

ity or other improper motive to the jury, and in case of such interference the court will impose equitable conditions on a defendant seeking relief. *Barclay v. Adair*, 157.

## DEBENTURES.

*Municipal.*]—See MUNICIPAL, 1.

## DEDICATION.

*Of Highway.*]—See SURVEYORS' ACT.

## DEED.

*Sheriff's.*)—See EJECTMENT, 5.

## DEMURRER.

See WRONGFUL DISTRESS.—PROMISSORY NOTE, 3.

1. *Conditional precedent.*)—The declaration claimed damages for the breach of contract between the plaintiff and defendant for sawing timber, containing an agreement by the defendant to supply the plaintiff with such a portion of the price as would enable the plaintiff to carry out the contract, but did not aver any demand on, or refusal by the defendant to supply such moneys. *Held*, bad on demurrer. *Tullock v. Wells*, 47.

2. *Pleadings--Waiver.*)—Declaration on a bond conditioned to convey to the plaintiffs within three months a certain steamboat, and for quiet possession of the same from the making of the bond, assigning as breaches, 1st. For not conveying within three months. 2nd. For an eviction by one O. S. G. under the powers of a mortgage derived from the defendants. Pleas: to the first breach, that said steamboat was mortgaged to J. H. C. at the time of execution of the bond, for the same amount as plaintiffs had agreed to pay defendants,

and that defendant had handed him the notes given by the plaintiffs for the price; and the said J. H. C. held the mortgage only as security for due payment thereof, and plaintiff's thereupon discharged defendants from procuring such conveyance. Plea to second breach, after stating a similar agreement, alleged a transfer of the mortgage from J. H. C. to O. S. G., and that the plaintiffs made default in their agreement by default of non-payment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignees. Both pleas held bad on demurrer, the plaintiffs engaging to apply their payments towards an encumbrance not amounting to a waiver of their right to a conveyance from the vendors. *Corby et al., v. Cotton et al.*, 209.

## DEPOSIT.

See RACING.

## DISTRESS.

See WRONGFUL DISTRESS.

## DIVISION.

*Of municipal townships into wards.*

—See MUNICIPAL, 3.

## DOWER.

1. *Exchange--Evidence.*)—Where in an action of dower the defence rested upon an alleged exchange by the husband for other lands out of which the widow had been satisfied her dower, and no deeds were produced, and the only evidence for the defence consisted of parol statements that the husband had "traded" certain lands. *Held*, there was not evidence to warrant a jury in finding for the defendant. *Stafford v. Trueman*, 41.

2. *Evidence—Pleading—Amendment.*]—The defendant in an action of dower pleaded *ne unques seizie que dower*, and after trial and verdict against him remembered that a bond had been executed by himself and the demandant several years before, providing for the release of the dower in question, which bond had remained in the hands of a third party, and not been produced at the trial. The court granted a new trial on payment of costs, with leave to add a plea. *Germain et ux. v. Shuart*, 86.

3. *Satisfaction.*]—The demandant of dower had accepted for her claim as dower, a bond from the tenant of the land for the purpose of securing to her as part of a family arrangement, a maintenance which, after enjoying for some time, she relinquished. She had also added her own hand and seal to the bond. *Held* that even though the recitals in the bond did not operate by way of estoppel, that a jury were warranted in finding that it amounted to a satisfaction of the plaintiff's claim to dower. *Germain et ux. v. Shuart*, 316.

4. *Alien—Seizin.*]—*Held*, that the widow of an alien is entitled to dower in real estate in Upper Canada, of which her husband had been seized during his lifetime. *Davenport v. Davenport*, 401.

## EASEMENT.

See TRESPASS, I.

## EJECTMENT.

See COMMON LAW PROCEDURE ACT,  
2.

1. *Statute 16 Vic., ch. 183.*]—*Held*, that the assignee of property (previously sold for taxes) coming within the 8th and 9th sections of

16 Vic., ch. 183, was entitled to prevail against the sheriff's purchaser at such sale for taxes—the 12th section of that act providing that the word “owner” shall be construed to mean such person, his heirs, executors and assigns. *Gilchrist v. Tobin*, 141.

2. *Court houses—Custody of.*]—Upon ejectment brought to try the question whether the sheriff or the municipal council were entitled to the control of the court house, and the appointment of a custodian of it. *Held*, that the title of the plaintiffs, by virtue of a deed from the town council of the town of Goderich, being admitted, the defence must fail, the question in dispute not being decided. *Municipal Council of Huron and Bruce v. Macdonald et al.*, 278.

3. *Lease—Estate.*]—The plaintiff, by indenture, dated 6th April, 1854, did “demise, lease and to farm let,” the land in question to the defendant upon the following terms, that he shall pay “all rates, levies and assessments upon the said property, enclose the same with a good fence,” and “farm the same in a husbandlike manner.” The plaintiff covenanted for himself, his heirs and assigns, to rent unto the defendant (the premises) at the rate of six pence per acre, payable in advance.” There was no livery of seisin—nor any time mentioned. *Held*, that an estate at will only passed. *Wilmot v. Lababee*, 407.

4. *Boundary.*]—The question in dispute was, what quantity of land was granted by the patent; the description in which was, “beginning about 18 chains below a small creek which empties itself into the river Thames, in lot No. 17; thence W. to the Eastern boundary of lot 16, 2 chains, more or less; thence



N. 45° W. to the N. E. angle of lot 16, 28 chains, more or less; thence S. 45° W. to the river Thames, and thence along the bank of the river against the stream to the place of beginning, being the broken fronts of 16 and 17." The lots were supposed to contain 150 acres. There are two creeks, and the point of commencement contended for by the plaintiff (the upper creek) would give him a much larger quantity of land than the defendant claimed he was entitled to, while that sought to be upheld by the defendant would reduce it to about 50 acres. An old map from the surveyor-general's office was put in evidence, under which the lot had evidently been granted; and a surveyor called for the defence, stated that the ground contended for by the plaintiff corresponded best with the old map. *Held*, that as the description contended for by the plaintiff corresponded best with the oldest plan to be found in the surveyor-general's department, and with a survey since made for the purpose of tracing out or completing parts not fully surveyed before, he was entitled to recover. *Semble*, per *Draper*, C. J. The Crown may grant a tract of land by a sufficient description to designate the portion meant, although the township within which the land lies has not been surveyed and laid out into lots and concessions, and the grantee will be entitled to hold it although a subsequent survey made by authority of the Crown makes it by name a different lot, or places it in a different concession from that named in the patent, or the surveyor laying it out projects a road through it. *Horne v. Munro et al.*, 433.

5. *Taxes*—*Sheriff's deed.*] *Held*, that the vendee of the sheriff upon

a sale for arrears of taxes, which did not appear to be clearly due, was not entitled to recover. *Quære*, as to the effect of a conveyance under the 65th sec. of the statute 16 Vic., ch. 182. *Harbourn v. Boushey*, 464.

## ENDORSERS.

*See* PROMISSORY NOTES, 2.

## ENROLMENT.

*See* MORTMAIN.

## ESTATE.

*See* EJECTMENT, 3.

## ESTOPPEL.

*See* MORTMAIN.

## EVIDENCE.

*See* DOWER, 1 & 2.—AFFIDAVIT, 2.

—COMMISSION—INTERPLEADER,

2.—COVENANT, 3.

*Professional.*]—*See* SURVEY.

*Of loss of bill of sale.*] *See* BILL, 1.

1. *Admissions*—*Notice to produce*]—In an action of ejectment, the point in dispute was whether T. R., one of the plaintiffs, had ever conveyed the premises in question to one J. R., deceased (under whom the defendant derived title,) evidence was given of conversations in which T. R. had stated either that he had given a deed to J. R. of the property in question, or that all the title to it was vested in J. R., and a letter from T. R. was also produced referring to such a deed, but no strictly legal evidence was given of the contents of such deed. *Held*, that such evidence under the circumstances was admissible on the part of the defendants as primary evidence, and that notice to the plaintiffs to produce



such deed was unnecessary. *Rothers et al. v. Card*, 89.

2. *Judgment.*]—In an action for money had and received. *Held*, that an indictment, upon which the defendant had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible as proof of that fact. *Macdonald v. Ketchum*, 484.

## EXCHANGE.

*See* DOWER, 1.

## FEMALE.

*Unmarried.*]—*See* SEDUCTION.

## FIRE.

*See* CARRIERS, 2.

## FORFEITURE.

*See* MORTGAGE, 3.

## FORGERY.

*Motion for a new trial under 20 Vic., ch. 61.*]—The prisoner was indicted for forgery. The facts appearing in evidence being that a promissory note had been drawn by himself, payable *two* months after date to the order of one T. S., and afterwards indorsed by said S., the prisoner then altered the note from two to three months, and discounted it at the Bank of B. N. A., in London, C. W.; upon this fact the jury convicted him of forgery. The motion for a new trial was made under statute 20 Vic., c. 61, on the ground that the forgery or uttering, if any, was a forgery of, or the uttering of a forged *indorsement*, (the note having been made by himself) and that there was no legal evidence of an intent to defraud. *Held*, that by altering the note while in his own possession after it was endorsed, it was a

forgery of a note, and not of an indorsement; and 2ndly, that the passing of the note to the third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. *The Queen v. Thomas Craig*, 239.

## FRAUD.

*See* INSURANCE, 2.—INTERPLEADER, 1 & 2.

*Misdirection.*]—In an action on a policy of insurance. *Held*, that the sixty days allowed for the payment of the money by the condition is to be counted from the time the insured puts in the proofs he relies on, and that every exception to such proof must be raised by a special issue not under that condition. The question of fraud on a policy of insurance is one for the jury, and although the court may be dissatisfied with the value set upon his property by the assured, still unless he appears to have valued it too high *mala fides*, and not by error of judgment, they will not disturb the verdict. An agreement by which a third party having no interest in the freehold was to share in the profit and loss of the proceeds of the property insured. *Held*, not to be such an agreement as to vitiate an insurance by the owner of the freehold. *Rice v. The Provincial Insurance Company*, 548

## GARNISHEE.

*See* ORDER.

## HIGHWAY.

*Dedication of.*]—*See* SURVEYOR'S ACT.

## INDIAN.

*Lands Statute*, 13 & 14 Vic., ch. 74.]—The defendant entered into a

verbal agreement to farm the land of an Indian woman on shares for five years, and took possession. He was found guilty of a misdemeanor under 13 & 14 Vic., ch. 74. *The Queen v. James Hagar*, 380.

### INFANCY.

See QUO WARRANTO.

### INFRINGEMENT.

See PATENT RIGHT.

### INSOLVENT ACT.

See ARREST, 2.

### INSURANCE.

See AGENT.

*Policy.*]—See POLICY, 3.

1. *Avoidance of Policy—Ratification.*]—The plaintiff insured with the defendants on a policy, containing a condition avoiding the same if any double insurance should subsist without the defendant's consent. The plaintiff's father, without plaintiff's directions, paid the premium for an insurance on part of the same premises with another company, but no policy was issued until after a fire had consumed the premises, and the plaintiff received the insurance money on the second policy. *Held*, 1st. That an insurance had in fact been effected with the second company within the terms of the condition contained in the policy issued by the defendant. 2nd. That the plaintiff having taken the benefit of such assurance, he had thereby avoided the policy issued by the defendant. *Dafoe v. The Johnstown District Mutual Insurance Company*, 55.

2. *Fraud.*]—The not communicating at the time of the proposal for an insurance, the fact that there was an insurance already affected, with another company. *Held*, not to be such a wrongful concealment as to sustain a plea of fraud, avoiding the policy. *McDonell v. The Beacon Fire and Life Assurance Company*, 308.

3. *Conditions.*]—*Held*, that the sixty days allowed by the condition endorsed on the policy for the payment of the money does not begin to run till after the insured has given in his proofs of loss, and upon an action brought before the expiration of sixty days, the plaintiff was non-suited. *Hatton v. The Provincial Insurance Company*, 555.

### INTERPLEADER.

1. *Fraud.*]—Where a trader being in embarrassment, arranged with the plaintiff to supply him with goods as agent, with a right to retain whatever sum he could make over a certain price, and also gave plaintiff a confession of judgment under which execution was issued and the traders furniture sold, part of which was purchased by the plaintiff, and remained in possession of a brother-in-law of the trader, in the house of the latter, and the *bona fides* of the transaction was proved at the trial solely by the evidence of the trader and his brother-in-law, when a disinterested witness might have been called. The court ordered a verdict for the plaintiff to be set aside, and a new trial had, on the ground that the ends of justice might be furthered by a second investigation. *Fowler v. Hendry*, 350.

2. *Evidence—Fraud.*]—Plaintiff was son-in-law of one J. D., and

lived in the same house, using half the same shop, and it was clearly shewn that the plaintiff and J. D. had made certain arrangements with the express object of putting J. D's property out of reach of certain creditors. Part of the evidence admitted for this purpose was a settlement of J. D's real estate prior to plaintiff's marriage with his daughter. In an action to try the title to certain goods alleged to have been purchased by plaintiff at a sheriff's sale of J. D's goods, it appeared that the purchase money paid by plaintiff had been credited to him out of sums payable by plaintiff to another estate, and in fact went in relief of the claims on J. D. *Held*, first, that evidence of the settlement was admissible.—Second, that the jury rightly found against the plaintiffs claim. *Cook v. Hendry*, 354.

3. *Change of possession*--Stat. 20 Vic., ch. 3.]—*Held*, that an assignment for the benefit of creditors, accompanied by an immediate and continued change of possession did not come within the statute 20 Vic. ch. 3, and was valid under the former statutes. *Hutchison v. Roberts*, 470.

### INVENTORY.

*Assignment.*]—The defendant seized (under an execution against McL. and F.) goods claimed by the plaintiff under an assignment, duly registered in the county court office of Northumberland and Durham—which had a schedule of goods attached intended to be passed thereby. The goods seized had gone into the store prior to the execution of the assignment, and were not contained in the schedule. The seizure took place in February and the plaintiff did not take pos-

session till May. One of the assignors, however, swore he was in possession as agent under the assignment, from the time of its execution till May. The jury found for the plaintiff. On a motion to enter a nonsuit, *held*, that the assignment only passed what was contained in the inventory, and that the rule for a nonsuit should be made absolute. *Gunn v. Ruttan, Sheriff*, 516.

### JUDGMENT.

*See* EVIDENCE, 2.

*Final.*]—*See* COSTS.

### SPECIAL CASE.

*Registry of—Construction of* 9 Vic., ch. 34, and 13 & 14 Vic., ch. 63.]—A conveyance from an execution debtor made prior to 1st of January, 1851, and to the registry of a judgment upon which *Fi Fa* lands issued was held to prevail against a deed from the sheriff under such *Fi. Fa.*, although such conveyance was not registered till after such judgment, but before the delivery of the *Fi. Fa.* to the sheriff. Action of ejectment brought to recover possession of part of lot 28 in the 5th concession of Clarke, in the county of Durham. *Brogden v. Collins et al.*, 61.

### JURAT.

*See* CHATTEL MORTGAGE.

### JUSTIFICATION.

*See* LIBEL.

### LACHES.

1. *New Trial—Costs.*]—Where the court granted a new trial to enable a defendant to tender evidence which had been excluded on the first trial in consequence of the



laches of his attorney or himself, in not giving a sufficient notice to produce, the court imposed upon the defendant the terms of payment of costs of the first trial. *Grey v. Dayfoot et al.*, 156.

2. *New Trial.*]—Where a defendant shewed that he and his witnesses were absent from court in consequence of his illness at the time, and the damages might, at all events, have been materially lessened by their testimony: the court ordered a new trial on payment of costs. *Farley v. Glassford*, 285.

### LANDLORD.

*See* LEASE—NUISANCE.

*And Tenant--Out-going Tenant.*]—In a three years' lease the words "also to allow the said W. & J. N. (tenants) the right of leaving in fall crop the same quantity of land as is now in fall crop when they get possession," coupled with the fact that there was then a fall crop on part of the land which had been sown by the preceding tenant, and which he was entitled to reap, were—*held* to confer on the tenants the right to sow a crop during the tenancy which they might reap afterwards, and that they had a right to dispose of such crop to third persons.

*Campbell v. Buchanan et al.*, 179.

### LEASE.

*See* EJECTMENT, 3.

*Landlord — Reversion.*]—The plaintiff leased land and entered into a covenant to leave some acres sown to be paid for by the landlord at a valuation upon the termination of the term. The defendant purchased the reversion from the landlord. and treated for the sale of the crops at the valuation,

assuming acts of ownership. *Held*, that by his acts he had assumed the landlord's liability, and was responsible under the lease. *Merton v. Scott*, 481.

### LIABILITY.

*Of individual members of Joint Stock Companies.*]—*See* COMPANY I. *Of Railway Co., as Common Carriers.*]—*See* RAILWAY, 2.—AND CARRIERS, I.

*Personal of School Trustees.*]—*See* SCHOOL, I.

*Of Agent.*]—*See* AGENT.

### LIBEL.

*Justification.*]—The defendant was indicted for libel, and pleaded two pleas in justification, the gist of which were—that one G. N. had falsely laid an information on oath against the defendant charging defendant with attempting to assassinate him by firing a pistol at him; and secondly that said G. N. was presented for perjury for having laid this false information. It was shewn at the trial that the said G. N. had been presented by the grand jury, but not for the matters complained of by defendant, and the jury found for the Crown. The court upon these facts discharged a rule *nisi* for a new trial. *Regina v. Ogle Robert Gowan*, 136.

### LICENSE.

*Revocation.*]—The defendant, by an instrument in writing, agreed with the plaintiff to take a certain saw mill according to the terms of a certain lease, and with a provision that the defendant was to take the pine off the land known as the Sammis lot first, as the said plaintiff was bound to take off the same. The plaintiff subsequently purchased



the fee simple of the Sammis's land. *Held*, that the plaintiff was entitled to revoke any license implied by such agreement, and to maintain an action for trespass against the defendant for removing from the lot formerly owned by Sammis, pine and saw logs, after he had received notice forbidding such removal. *Campbell v. Howland*, 358.

LIEN.

See REPLEVIN.

LIMITATIONS.

*Statute of.*]—See MERGER.

MEASURE.

*Of Damages.*]—See Damages, 1.  
COVENANT, 1.

MERCHANDIZE.

See RAILWAY, 4.

MERGER.

See MORTGAGE, 2.

*Statute of Limitations.*]—Where a tenant for life and the reversioner in fee had conveyed property in fee simple by one deed of bargain and sale to one person, it was held that the life estate did not merge in the reversion, and that the Statute of Limitations did not run against the remainder man till the death of the tenant for life. *Sladden v. Smith*, 74.

MILL DAM.

See COMMON LAW PROCEDURE  
ACT, 1.

MISDIRECTION.

See RULE NISI.—SLANDER.—FRAUD.

MONEY PAID.

*When Recoverable.*]—The master of the appellant's vessel, on the transshipment of a cargo of wheat, on its way from Owen Sound to Quebec, into the respondent's vessel, gave a receipt to the respondent for the lake freight, stating that the appellant's vessel and her owner were thereby held responsible for the wheat, weighing 5,934 bushels, at Quebec. On arrival at Quebec the cargo was found 68 bushels short, and the respondent allowed the value of that quantity to the consignee out of the river freight. *Held*, under the circumstances, that the respondent was not entitled to recover the amount deducted as for money paid for the appellant. *Waddell* (appellant) *v. McIntosh* (respondent) 49.

MORTGAGE.

1. *Waiver--Damages.*]—This action was brought on a bond, conditioned to convey within 3 months a certain steamboat, and for quiet possession of the same. The breaches assigned being for not conveying within three months, and for an eviction by a third party. The defendants pleaded that the steamboat was mortgaged to one J. H. C., at the time of the entering into the bond (of which plaintiffs were well aware) for the same amount as plaintiffs had agreed to pay defendants, and the notes given by plaintiffs were handed to J. H. C., who then held the mortgage as collateral security for the due payment of the notes; and that plaintiffs thereupon discharged defendants from procuring such conveyance. Secondly—That J. H. C. afterwards transferred the mortgage to O. S. G., and that plaintiffs made default in the payment of one

of the notes, whereupon O. S. G. took possession of the property. The substantiality of the pleas came before the court on demurrer *see page 209*. The question on this motion was, whether the plaintiffs were entitled to the damages as assessed by the jury (£6675), the defendants contending that the measure of damages should have been the amount necessary to redeem the steamboat, the court *held* that the damages were properly assessed. *Corby et al. v. Cotton et al.*, 392.

2. *Promissory note—Merger.*]—Where a debtor gave to his creditor a mortgage and promissory notes for the same debt—the latter payable at the same times as the instalments of the mortgage, and no allusion was made in either instrument to the other. The creditor subsequently passed both instruments to the third parties, as collateral securities for debts due them. Upon ejectment brought in default of payment of an instalment in the mortgage, the defendant proved the facts, and that he had paid the note given for the instalment. *Held*, that the plaintiff was entitled to recover. *Quære*, did not the note merge in the higher security. *Draper, C, J. Fairman v. Maybee*, 467.

3. *Forfeiture—Payment.*]—The plaintiff held defendant's mortgage with a condition of forfeiture that the whole principal should become payable if the interest was unpaid for ten days after it became due. By agreement between them plaintiff drew on defendant for the interest (at three days' sight) a few days before it became due, which draft was discounted by plaintiff at his bank, and the proceeds placed to his credit prior to the expiration of the ten days limited for the for-

feiture, and was afterwards accepted by defendant; but upon maturity was dishonoured, and charged back to plaintiff's account in the bank. The defendant contended that the interest having been received by the plaintiff (by the discount) before the 10 days expired for forfeiture could not be claimed. *Held*, that it was in fact no payment, and that the whole amount of the mortgage was due. *Cameron v. Knapp et al.*, 502.

## MORTMAIN.

*Enrolment—Estoppel.*]—Registration in the county registry office in Upper Canada. *Held* sufficient to make a deed valid under the Statutes of Mortmain, without enrolment in Chancery. *Quære*, whether a tenant or licensee of land is estopped from disputing his landlord or licensor's title as void on a statutable objection? *Hallock et al. v. Wilson*, 28.

## MOTION.

*To set aside.*]—*See* AWARD.

## MUNICIPAL.

*Council.*]—*See* COURT HOUSE.

1. *Debentures—Pleadings.*]—The fact that a certain Municipal debenture had been stolen previously to its being regularly issued. *Held*, no bar to the claim of a *bona fide* holder for valuable consideration, without notice. A plea that such debenture was not issued "under the formalities required by law," because the by-law under which it was issued did not settle a special rate, and was therefore void. *Held* bad, for not averring distinctly that such debenture was issued in pursuance of a by-law, and for not pointing out wherein it was defective. *The Trust and Loan Company of Upper Canada v. The City of Hamilton*, 98.

2. *Corporation—By-law.*]—Under statutes 12 Vic., ch. 81, and 16 Vic., ch. 181, a by-law imposing one uniform rate for draining into the common sewers of a city of 5s. per foot frontage, to be charged upon the proprietors of real property for each and every foot frontage of property draining into the said sewers. *Held*, invalid, as being an arbitrary rate, not taxed in proportion to the assessed value of the property, and not maintainable under the 10 Vic., ch. 181, sec. 15. *Ex parte Aldwell v. The City of Toronto*, 104.

3. *Townships—Divisions of into wards.*]—Upon an application to quash a by-law dividing a township into rural wards where neither the townships sought to be divided nor the union of townships of which it formed one, were, prior to the passing of the by-law, divided into wards; and the by-law dividing same was not passed within the first nine months of the year in which the junior townships had 100 resident freeholders and householders on its collector's roll. *Held*, that the by-law was invalid. *Loucks v. The Municipality of Russell*, 388.

4. *Council—12 Vic., ch. 81—16 Vic., ch. 181.*]—*Held*, that a majority of the whole number forming the provisional municipal council of a county must vote at the election of warden. *Reg. ex rel. Evans v. Starratt*, 487.

### MUTUALITY.

See AGREEMENT, 2.

### NEGLIGENCE.

See RAILWAY, 1.

### NON-PERFORMANCE.

*Of conditions on policy.*]—See POLICY, 2 & 3.

### NONSUIT.

See COMMISSION—BOND.

### NOTE.

*Authority to sign.*]—see PRINCIPAL

### NOTICE.

See BILL, 2.

*To produce.*]—See EVIDENCE, 1.  
*Of assignment of debt.*]—See ORDER, \*

2

*Of title.*]—See COMMON LAW PROCEDURE ACT, 2.

### NUISANCE.

*Landlord Tenant.*]—*Held*, that the landlord and tenant were both liable for damages, arising from a nuisance erected by the landlord in the house, and continued to be used by the tenant while occupying it *McCallum v. Hutchison*, 598.

### OBSTRUCTION.

*Of water course.*]—See COMMON LAW PROCEDURE ACT, 1.

*Of road—Contractor personally liable.*]—Defendant having been employed by a road company to furnish them with stones, by placing them on the road, accidentally caused the death of plaintiff's servant and horse. On an application for a nonsuit, it was held that the defendant was personally liable for the damage done, under 16 Vic., ch. 190, sec. 49. *Lennox v. Harrison*, 496.

### ORDER.

*Effect of final order for protection from process.*]—See ATTACHMENT.

*Garnishee order*—*Notice of assignment of debt.*]—Although an order upon a garnishee under the Common Law Procedure Act, 1856, is not intended to have operation upon debts of which the judgment debtor has already divested himself by assignment; yet, where such assignee had neglected to give the garnishee precise and distinct notice of the assignment; and his attorney stood by whilst such order was made, and the garnishee had paid the debt to the judgment creditor, the court relieved the garnishee from further proceedings taken at the instance of the assignee in the name of the judgment debtor. *In re Jones ex parte Kelly.* 149.

#### PAROL.

*Discharge.*]—*See* AGREEMENT, 1.

#### PATENT RIGHT.

*Infringement.*]—Plaintiffs had agreed under seal with one N. for a license to use their patent invention in erecting a certain number of mills at a fixed rate per mill. The defendant's mill was erected by N., according to the plaintiff's patent, and N. charged him a less sum, on the understanding he was to settle the patent fee with the plaintiff. Just before the trial, the defendant paid the plaintiffs their patent fee, and on the trial, claimed the plaintiffs should be nonsuited on the ground that the infringement, if any, had been made by N. *Held*, that the defendant had infringed the patent and brought himself under the terms of the statute 14 & 15 Vic., ch. 79, as having made use of the machinery of the mill without first obtaining the plaintiff's consent, *Smith et al. v. Powell*, 332.

#### PAYMENT.

*See* MORTGAGE, 3.

*Voluntary.*]—*See* REPLEVIN, 1.

#### PERSONALITY.

*See* ADMINISTRATION.

#### PLEA.

*In bar*—*Assessment of damages.*]—Upon an assessment of damages for goods sold, an attempt was made on the part of the defendant to prove a contract to deliver the goods in Toronto free of charge, and that they were refused by defendant in consequence of their arriving with charges on them, and the jury found nominal damages only. *Held*, that such matter should have been pleaded in bar, and was not available for the defendant on an assessment of damages. *Comstock v. Thistle*, 27.

#### PLEADING.

*See* DOWER, 2.—MUNICIPAL, 1.—TRESPASS, 3.—TRIAL, 1.—DEMURRER, 2.

1. *Accord and Satisfaction.*]—A plea in answer to the plaintiff's claim for damages sustained by a breach of an agreement, alleging that the defendant entered into a new agreement in writing with the plaintiff, containing a stipulation that the defendant would pay a certain sum, and secure the same by his endorsed note, and that the plaintiff accepted same upon certain terms, and alleging a tender of such note by defendant, and a refusal by plaintiff. *Held* bad on demurrer, on the ground that the delivery of the note was an essential part of the consideration, and that the plaintiff was not bound by the agreement until he had received the note. *Steward v. Hawson*, 168.



2. *Consideration — Promissory Note.*]—In an action on a promissory note, Payee v. Maker, the defendant pleaded that the note was given for plaintiff's title to land, and that plaintiff at the time, and ever since, had no title to the land, and consequently there was no consideration for the note on demurrer. *Held*, that the plaintiff having conveyed his "right, title, and interest" in the lot for which the note was given, the consideration was sufficient, and the plea bad. *Lundy v. Carr*, 371.

### POLICY.

*Avoidance of.*]—See INSURANCE.

1. *Conditions on—Non-performance of.*]—Action on a policy of insurance for £500. The case turned upon the 11th condition on the back of policy, by which plaintiff is bound within 14 days, to furnish a *statement of claim with proof thereof by affidavit by affirmation.* *Held*, the plaintiffs were bound by the condition endorsed upon the policy, and having violated it, they lost their claim upon the defendants, but thinking they could give evidence of a waiver of this condition, and asking for a new trial, the court granted it on payment of costs. As by entering a nonsuit, it would be equivalent to a verdict for defendants, the six months having expired within which the action must be commenced. *Cameron et al., assignees of estate of Danilict v. The Monarch Assurance Company*, 212.

2. *Conditions on—Non-performance of.*]—An action on a policy of insurance for £500. The case turned upon the 10th condition on the back of the policy, by which the insured is bound within fourteen days to furnish a *statement of claim*

*with proof thereof by affidavit or affirmation when requested.* *Held*, that plaintiffs were bound by the condition endorsed upon the policy if a proper and *bona fide demand* had been made, but such not being the case the rule was discharged. *Cameron v. Times & Beacon Fire Insurance Company*, 234.

3. *Insurance—Abandonment.*]—When the owners of a vessel, which was stranded, gave notice of abandonment, and the master afterwards on behalf of those concerned entered into a contract to get the vessel off, which was done; and the jury expressly found that the evidence was such as to warrant a prudent owner in abandoning the vessel as a total loss, and rendered a verdict for the plaintiff generally the court being of opinion that the evidence warranted the finding of the jury, and that the plaintiffs were entitled under it to give notice of abandonment (as of total constructive loss), sustained the verdict. *King et al. v. The Western Assurance Company*, 300.

### POSSESSION.

*Demand of.*]—See TENANCY.

*Change of.*]—See INTERPLEADER, 3

### PRINCIPAL

*And Agent—Authority to sign note.*]—It was proved that one D. was clerk or agent for the defendant in keeping a store at L., and that defendant had sanctioned his purchasing certain goods. *Held*, that the circumstance gave no implied authority to D. to sign the defendant's name to negotiable paper, and that the jury were warranted in finding that the defendant had given D. no authority to purchase goods of the plaintiff. *Heathfield v. Van Allen*, 346.

## PROCEEDINGS.

*Irregular.*]—See REPLEVIN, 4.

## PROMISSORY NOTES.

See PLEADING, 2.—MORTGAGE, 2.

1. *Extinguishment of right to sue thereon by taking chattel mortgage.*]—The plaintiff holding defendant's note for £85 2s. 4d., with interest, takes a chattel mortgage intending it as a collateral security. *Held*, that the right to sue on a promissory note was extinguished by taking the mortgage. *Parker v. McCrea*, 124.

2. *Endorseees — Release.*]—The plaintiffs and one of the defendants G. S. W., having large business transactions, were in the habit of striking a monthly balance, and the latter giving to the former a due bill for the amount found due, which amount was then brought forward and formed the first item in the account for the next month, and the promissory notes which had fallen due the previous month were still held as security by the plaintiffs. The notes sued on in this cause formed an item in one of these monthly accounts, and the maker (it being an accommodation note) and second endorser contended that, as time had been given to the party really liable to pay the note, they were released. *Held*, that all the defendants were liable. *Whittemore v. et al. Lines et al.*, 403.

3. *Surety — Demurrer.*]—*Held*, that the payee of a joint and several promissory note, made by two, can only be treated as holding one as a surety for the other upon his express consent to do so at the time of taking the note. *Ball v. Gibson et al.*, 531.

## PURCHASER.

See—TENANCY.

## QUO WARRANTO.

*Residence--Infancy.*]—*Held*, that when a party slept and lived during the week days in a house with other parties having one common entrance, while his wife and family resided at a village a few miles distance, he came within the provisions of the Municipal Corporation Act of 1849, and was entitled to vote under that act as a resident householder in the village where he lived during the week. When a vote had been rejected by the judge who decided the case, upon erroneous grounds, but upon further enquiry by the court it was found to be a bad vote on other grounds, they refused to allow it. *Held* also, that upon a question of the age of a voter, the written memoranda and return of the clergyman who married his father and mother was better evidence than the memory of individuals unaccompanied by any memoranda. *Reg. ex. rel. Forward v. Bartels*, 533.

## RACING.

*Deposit.*)—Two parties, W. & L. each deposited £50 in the defendant's hands to be run for by their horses on the following terms: L's horse (Butcher) was to distance W's horse (Warrior) three times out of five, in mile heats. Two heats were run; the first one Butcher did distance Warrior, the second one Warrior distanced Butcher, when his owner contended that he had won the race, as a distanced horse could not run again. *Held*, that as the usual rule of racing (that a distanced horse cannot run again) was properly held in-

applicable. It must be set aside absolutely, and the race was not won. *Wilson v. Cutten*, 476.

## RAILWAY

*Company.*]—See *GARRIERS*, I.

1. *Crossing--Negligence.*]—Under the 14th & 15th Vic., ch. 21, sec. 21, the omission to ring the bell or sound the whistle of a locomotive engine on approaching a highway crossing on the railway, was held evidence of a breach of duty and negligence on the part of the company sufficient to support a verdict of damages for the value of cows killed by the engine at such crossing. (See 20 Vic., ch. 12, sec. 16, since passed). *Shield v. The Grand Trunk Railway Company*, III.

2. *Company--Common Carriers--Their Liability as such.*]—The plaintiff delivered to defendants, as common carriers, foreign goods in bond at Buffalo to be carried to Brantford valued at £69 3s. A receipt was given (26th of April, 1854) for (amongst other things) a box at Buffalo for *way station*. The contract as alleged in the declaration, being to carry the goods from Buffalo to Brantford, and *there to deposit and keep them for the plaintiff*, for reward, &c. Frequently before the defendant's freight station was burnt at Brantford (the 8th or 9th of May, 1854), and afterwards, plaintiff applied for the goods, when the answer was "not arrived." On the 9th of May the answer was "burnt up." It was admitted the goods arrived on the 5th or 6th of May, and were stored in a bonded warehouse in the defendants' control, and were burnt up on the 8th or 9th, and that no notice of arrival was sent to consignee. *Held*, that under the con-

tract as stated in the declaration and proved, the defendant's liability as common carriers had ceased, and that of warehousemen commenced, and that whatever their liability was as warehousemen, that of common carriers having ceased, they were not liable under the contract as alleged in the declaration and not bound to give notice. *Bowie v. The Buffalo, Brantford & Goderich Railway Company*, 191.

3. *Crossing--Road Company.*]—Where a railway company made alteration in the grade of a road at the railway crossing, which road was owned by a legally incorporated road company, and the alterations were subsequently ratified and adopted by the road company by collecting and receiving tolls. *Held*, that the road company, by such adoption and acceptance, were to be treated as responsible for any injury resulting from the omission to fulfil a duty arising out of such altered state of the highway. *Whitmarsh v. The Grand Trunk Railway Company of Canada*, 373.

4. *Company--Merchandise.*]—*Held*, that a railway company is not liable for merchandise carried by a passenger as baggage for which no extra charge was paid. *Shaw v. The Grand Trunk Railway Company*, 493.

## RATIFICATION.

See *TRESPASS*, 4.—*INSURANCE*, I.

## REGISTRY.

See *JUDGMENT*, I.

*Certificate of.*]—See *COVENANTS*, 3

## RELEASE.

See *PROMISSORY NOTES*, 2.



## REPLEVIN.

See SCHOOL, 2.

1. *Sewerage rate—Voluntary payment.*—Certain premises in the city of Toronto which drained into a ravine were demised by the defendant to one J. T. A., of whom the plaintiff in replevin was assignee. The city of Toronto in making improvements, closed up the ravine and thereby occasioned an accumulation of water on the premises in question, rendering a drainage into the common sewerage necessary. The plaintiff then drained his premises into such sewer, and paid the frontage or sewerage rate charged by the city by-law upon the proprietor of the property, and claimed to set off the amount of such payment against the defendant's rent. *Held*, on demurrer, that such payment was voluntary and could not be recovered back from the defendant although it might enure to his benefit. *Quære*, whether the tenant is not liable, under his covenant to pay taxes. See *Metropolitan Board of Works v. The Vauxall Bridge Company*, 29 *Law Times*, 211. *Aldwell v. Hannath*, 9.

2. *Surrender—Satisfaction.*—The defendant leased certain premises to one F., from whom he took a note in payment of arrears of rent. F. let the plaintiff into possession of the premises, and the plaintiff made certain payments to defendants on account of rent, for which defendants gave receipts as for premises leased to F. On pleas of *rien en arriere* from Fraser, and *non tenuit*. *Held*, 1st, that plaintiff could not insist upon the taking of the note as a discharge of the rent due from F. 2. That there had been no surrender of the term of F. by operation of law. *McLeod v. Darch et al.*, 35.

3. *Damages.*—The defendant replevied certain account books under a writ in suit of *Crawford v. Brown*, and handed them to plaintiff, but before a removal could be effected, and while the parties were yet together, another writ of replevin in the suit of *McLaren v. Crawford* was placed in the hands of the sheriff, who thereupon again seized the books. *Held*, the taking of property under one writ of replevin does not prevent the operation of a second writ upon the same property under provincial statute 14 & 15 Vic., ch. 64, and 18 Vic., ch. 118, and the further, that the delivery as above stated was complete. *Crawford v. Thomas, Sheriff*, 63.

4. *Irregular proceedings—Breach of agreement.*—The writs of replevin were sued out by the plaintiff against the defendant, one in the *Court of Queen's Bench* for lumber, situate on the *east* side of the river Moira, the other in this court for lumber on the *west* side, and both records were entered for trial at the same assizes at Belleville; one cause was tried, the evidence given at the trial relating to the lumber on the *east* side of the river; but the verdict was recorded on the record in this court. A new trial was moved for and obtained on that verdict subsequently. (See 5 U. C. C. P. 341.) An agreement was then entered into by which the subject matter in dispute in this action was settled. Plaintiff then gives another notice of trial, but finds out his mistake and does not enter the record. Defendant's attorney however makes up a record and enters it, and when the cause is called on defendant's counsel appearing, and no one being present for plaintiff, he is nonsuited. The court upon application set aside the nonsuit without costs.



the matters in dispute having been settled by agreement they could not again be litigated without waiving or annulling that agreement. N.B. A judgment was published in this cause in Hilary Term last, (see 6 U. C. C. P. 474) by inadvertence of the reporter, the same never having been delivered, this being in fact the decision. *Canniff v. Bogert*, 81.

5. *Arbitration under school acts.*]—The principles involved in the judgment in the preceding case of *Kennedy v. Hall et al.*, and in the judgment of the Court of Queen's Bench, in the case of *Hugh Kennedy* against the same defendants affirmed. A school teacher, after an award had been made in his favour on a dispute as to salary with the school trustees under the School Acts, afterwards made a claim in a second arbitration for the amount payable under the first award, together with his salary for the further period which had elapsed since such award, and sought under an award obtained *ex parte* and a warrant thereon to recover the amount by a seizure of the trustee's goods. *Held*, on replevin by the trustees, that such a course was illegal and not contemplated by the School Acts. *Kennedy v. Burness et al.*, and *Murray v. Burness et al.*, 227.

6. *Lien.*]—The plaintiff's vessel, while under charter to a third party, was moored to the defendant's wharf, and some fittings stored on defendant's premises, who afterwards claimed them as against the plaintiffs for wharfage of the vessel, and wood furnished during the currency of the charter party. The jury having found for the defendant, a new trial was ordered. *The Provincial Insurance Company v. Robert Maitland*, 426.

7. *Seizure.*]—The plaintiff claimed a horse, the subject matter in dispute, as having purchased it. The defendant claimed under a sale upon a Division Court execution, which it appeared had not been regularly renewed from month to month. *Held*, that the execution not having been kept regularly in force, the sale in the interval cut it out, and that the plaintiff was entitled to recover. *Carrol v. Lunn*, 510.

## REVERSION.

See LEASE.

## REVOCATION.

See LICENSE.

## RIGHT.

*Under grant from the Crown.*]—See TRESPASS, I.

*Extinguishment of*—*To sue on promissory notes.*]—See PROMISSORY NOTES, I.

## ROAD.

*Obstruction of.*]—See OBSTRUCTION *Company.*]—See RAILWAY, 3. *Allowance for.*]—See Survey.

## RULE NISI.

*Misdirection.*]—*Held*, that the words "on the ground of misdirection," in a rule *nisi* for a new trial, do not comply with the Common Law Procedure Act of 1856. *Montgomery Dean*, 513.

## SATISFACTION.

See REPLEVIN, 2.—DOWER, 3. *Accord and.*]—See PLEADING, I.

## SCHOOL.

*Arbitration under school acts.*]—

See REPLEVIN, 5.

1. *Acts—Variance—Personal liability of trustees.*]—In an action of replevin for goods of school trustee distrained under an award for the salary of a school teacher, declaring the trustees individually liable on the ground "that the trustees did not exercise all the corporate powers vested in them by the school acts for the due fulfilment of the contract" made by by them with such teacher. *Held*, that the award as evidence did not support pleas which averred as required by the 13 & 14 Vic., ch. 48, sec. 10, a wilful neglect or refusal by the trustees to exercise their corporate powers as the ground for making them personally liable. *Held*, also, on the facts that the defendants as trustees were not personally liable, the award ascertaining for the first time the exact amount due to the teacher, and declaring the trustees personally liable without giving them any opportunity to exercise their corporate powers to raise the money to pay it. The action being of replevin, *held*, no notice of action was required. *Kennedy v. Hall et al.*, 218.

2. *Rates—Replevin—Taxes.*]—The action of replevin may be brought upon a distress for school rates and notice of action is not necessary, where several devisees and executors were rated to a school rate in respect of the property of their testator, as "John A. and brothers," which entry appeared to have been made at the instance of some of the plaintiffs; but two of them only had slept on the premises occasionally, although such was not their usual place of residence, and they had received the

usual notice of assessment in that form without appealing, and the same two had paid taxes on an assessment on the township roll in their individual names. It was held: 1st. That the facts afforded sufficient evidence to shew that the plaintiffs were "inhabitants" for the purposes of the rate. 2nd. That the parties were sufficiently named on the roll to render the rate lawful. 3rd. That a demand made by the collector on the plaintiff "John A.," named in the roll, was sufficient to bind all the plaintiffs. *Applegarth et al. v. Graham*, 171.

3. *Site—Statute—13 & 14 Vic., ch. 48.*]—Where a meeting was held to change the site of a school house, and arbitrators appointed who met and decided the question, but their decision was not acted upon, subsequently another meeting was called, and their decision and proceedings were acted upon, and the site changed. *Held*, that the proceedings were irregular, and that the trustees had not authority to change the site of the school house without the sanction of a special meeting of the freeholders and householders, and that the second meeting had no authority to alter the determination previously made. *Williams v. The School Trustees of Plymton*, 559.

## SEARCH.

See BILL, 1.

## SEDUCTION.

*Unmarried female—Statute 7 Wm. IV., ch. 8.*]—A "widow" is not within the meaning of the term "unmarried female," as used in the statute 7 Wm. IV., ch. 8, and her father cannot maintain an action for her seduction, when she was not living in his service, but

in that of her seducer. *Kirk v. Long*, 363.

### SEIZIN.

See DOWER, 4

### SEIZURE.

See REPLEVIN, 7.

### SET OFF.

See ATTACHMENT.

### SEWERAGE RATE.

See REPLEVIN, I.

### SHERIFF.

See ARREST, I

### SHIPPING AGENT.

*Carriers.*]-The plaintiff employed S. & H., who owned a warehouse, to purchase and store wheat for him. One G. stored wheat in the same warehouse, and having a quantity to ship, wrote to defendants, offering to load their vessel at certain rates, which offer was accepted, and in the meantime he saw the plaintiff, who agreed to ship 2000 bushels of his wheat in the same vessel in which G. was about to ship, and gave directions to S. & H. accordingly. 5,653 bushels of wheat in all were shipped *en masse*, as it had been stored. H., one of the firm of S. & H., superintending the shipping, and stating to the captain at the time (according to his own evidence) that he was shipping plaintiff's wheat first. The plaintiff's wheat turned out short some 400 bushels. *Held*, first, that the plaintiff was entitled to recover, and secondly, that the owners of the vessel were liable. *Waddel v. Macbride. et al.*, 382.

### SLANDER.

*Misdirection.*]-On a motion for a new trial on the ground of misdirection, as the court considered the evidence was properly left to the jury, although they would have been better satisfied with a verdict for the defendant, a new trial was refused, *Nolan v. Tipping*, 524.

### SPECIAL.

*Contract.*]-See CONTRACT.

### STATEMENT.

*False—Action.*]-Although as a general doctrine of law a party who makes a false statement, knowing it to be such, which is acted upon by another, may be held liable for any injury thus caused, yet where a party, in laying an information before a police magistrate, had given an incorrect version of the statement made to him by the defendant, and caused the plaintiff's arrest, it was held that an action therefor could not be maintained against the defendant. *Sparks v. Joseph* 69.

### STATUTE.

*Of limitations.*]-See MERGER.

*Of frauds.*]-See CONTRACT, I  
9 *Vic.*, *ch.* 34—13 & 14 *Vic.*, *ch.* 63  
—*Construction of*]-See JUDGMENT.

16 *Vic.*, *ch.* 183.]-See EJECTMENT,  
I.

16 *Vic.*, *ch.* 191.]-See COMPANY, I.

20 *Vic.*, *ch.* 61.]-See FORGERY.

12 *Vic.*, *ch.* 34.]-See SURVEYORS' ACT.

7 *Wm.*, IV. *ch.* 8.]-See SEDUCTION.

13 & 14 *Vic.*, *ch.* 74.]-See INDIAN.

20 *Vic.*, *ch.* 3.]-See INTERPLEADER,

12 Vic., ch. 81, & 15 Vic. ch 181.)

—See MUNICIPAL, 4.

13 & 14 Vic., ch. 48.)--See SCHOOL, 3.

### STREAM.

*Navigable.*)—See TRESPASS, 1.

### SURETY.

See PROMISSORY NOTES, 3.

### SURRENDER.

See REPLEVIN, 2.

### SURVEY.

*Crown—Allowance for roads—Professionalevidence*]—An original government survey of part of a township, made no mention of roads, and it was apparently the surveyor's intention the roads should be taken out of the then (wild land) adjacent. The surveyor who afterwards surveyed the adjoining lands, treated the road allowance as included within the lines of the original survey, whereby the plaintiff's lot would be diminished one chain in breadth. The jury having found for the defendant's, the court ordered a new trial, considering such verdict against the weight of evidence. The weight attached by the court to the evidence given by professional witnesses is diminished by efforts to sustain the views of the party who may call them—it should be given free from bias. *Stock v. Ward et al.*, 127.

### SURVEYORS' ACT.

12 Vic., ch. 34—*Dedication of highway.*)—On the trial of the question whether a certain street ought to be continued south of a certain point to the water's edge as a public highway through land of the plaintiff, who was admitted

to be owner of the land on both sides, the main evidence in support of such claim was a map, alleged to be the original map, by which the village was laid out forty years ago; shewing apparently such continuation, but not authenticated by any signature or date, and for upwards of twenty years before suit another plan, duly registered, had been in general use, and no user was proved for the purpose of a highway. The court held that they were not bound by the 41st section of the above act to declare the street so marked to be a public highway. *O'Brien v. The Municipal Council of Trenton*, 246.

### TAXES.

See SCHOOL, 2.—EJECTMENT, 5.

*Collector.*)—In an action against the principal and sureties on a collector's bond, *Held*, that the admissions of the principal are evidence against himself. *Quære* as to the sureties, *Ferrie v. Jones*, 8 U. C. Q. B. 192. *The Municipal Council of South Easthope v. Helmer et al.*, 506.

### TENANCY AT WILL.

*Purchaser-Demand of Possession.*)—The defendant in ejectment had been let into possession under a contract to purchase payable by instalments, with a stipulation for forfeiture if payment not made on a particular day, and the vendor had subsequent to such day received payment on account. *Held*, the defendant was tenant at will, and not by sufferance, and that a demand of possession was necessary. *Lundy v. Dovey*, 38.

### TENANT.

See NUISANCE.



*Outgoing.*]—See LANDLORD.

### TICKETS.

*Free.*]—See CARRIERS, 3.

### TITLE.

See COVENANT, I, 2.

*Of cause*]—See AFFIDAVIT, I.

*Covenant-Bond.*]—The plaintiffs sold the defendant a lot of land for £500, the title to which appeared defective in the registry office. On concluding the transaction, the defendant only paid £400, giving his bond, conditioned that if plaintiffs should, within two years from its date, make and complete a good and perfect paper title to the satisfaction of S. B. Freeman, he would pay the other £100. No further title was given, and the plaintiffs brought their action upon the bond, contending that the title, at the time of giving the same, was perfect, and that no detention should have been made. *Held*, that as the bond was given to cure a supposed defect in the title, which has never been remedied, he could not recover for it; or, in other words, that not having fulfilled the condition of the bond, he could not recover thereon. *Dewitt et ux v. Thomas*, 565.

### TORONTO ESPLANADE ACT.

*Held*, that the corporation of the city of Toronto and their contractors were under the first Esplanade Act, 16 Vic., ch. 219, authorised to enter upon the freehold water lots, as well as those held by their lessees, within the limits of the Esplanade for the purpose of its construction. *Small v. The Grand Trunk Railway Company*, 287.

### TRESPASS.

1. *Right under grant from the Crown—Navigable stream—Easement.*]—This action was brought to try the right to an inlet on Burlington Bay. The plaintiff claimed title by patent dated 19th March 1798, and contended that it conveyed the inlet: and that the “bank” referred to in the patent was part of the bay, and not part of the inlet, and consequently the public had no right thereon. Defendant contended that the inlet was part of the bay, and that the patent did not cover, but excluded the inlet; and further, that the *locus in quo* being navigable waters, if the crown could grant at all, the public have the right to use the fish in it. *Held*, that the *locus in quo* is a navigable river, and therefore the public have a right to the free use thereof as such. *Gage v. Bates*, 116.

2. *Boundary.*]—Trespass *quare clausum fregit*, the division line between two lots being in dispute, the plaintiff proved that the line he contended for had been run by a surveyor and fenced for about forty rods fifty years ago, and that it had been the recognized boundary between the parties. Lately defendant employed a surveyor who run a different line (probably right, although not done in strict accordance with the statute), he having chained the width of plaintiff's lot from an undisputed boundary in front, and a similar width in the rear. Upon these facts the jury found for defendant. The court granted a new trial on payment of costs. Upon an application therefor the Chief Justice stating that “compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favorably viewed; and if moreover an

actual possession of twenty years, in accordance therewith, can be shewn, it makes the plaintiff's a meritorious claim. *Wideman v. Bruel*, 134.

3. *Assault and Battery—Pleading*.—Assault and battery for beating plaintiff. Pleas, not guilty, and leave and license. On the argument, defendant's counsel contended that because the plaintiff had previously challenged defendant to fight the plea of leave and license was sustained, and that plaintiff should have replied an excess or unfair advantage if he relied thereon. *Held*, that (admitting the general principle) the facts did not support that view, and the rule was discharged, *St. John v. Parr et al.*, 142.

4. *Ratification*.]—When a sheriff, acting under a valid writ as a servant of the court seizes the wrong person's goods, a subsequent ratification by a party who, until such ratification, was a stranger to the taking, cannot alter the character of the original taking, and make such party a trespasser by relation. *Tilt v. Jarvis et al.* 145.

## TRIAL.

*New*]—See LACHES, I & 2.

*Motion for New*]—See FORGERY.

1. *Ground for a new trial—Pleading—New assignment*.]—The mere fact that the evidence might have warranted the jury in finding a verdict contrary to that rendered, will not be sufficient ground for setting such verdict aside, even where the court are inclined to think the evidence preponderated in favour of the unsuccessful party, but were not clearly convinced there was a denial of justice. Where, in an action brought on an agreement to

run the plaintiff's saw mill, the declaration suggested breaches "before and during, and after" a particular day, and the defendant pleaded a general averment of his readiness to perform the agreement, and the plaintiff prevented him, and after the particular day referred to evicted him from the mill, though the defendant was ready to perform his part, and the plaintiff new assigned for breaches, previous to the alleged eviction. *Held*, on demurrer, to such new assignment, and a rejoinder therein by plaintiff objecting to the plea, that it only answered part of the count in the declaration to which it was pleaded. 1st. That the objection to the plea came too late. 2nd. That the plea was good, the latter words of the plea not restricting the prior averment that the defendant was ready at all times. *Quære*, as to the effect of the 88th section of the Common Law Procedure Act, when a separate new assignment has been pleaded to several pleas. *Brown v. Malpus*, 185.

2. *Postponement of—Setting aside verdict*.]—In an action on a promissory note, in which the defendant pleaded his indorsement had been obtained by fraud, a second postponement of the trial had been refused by the presiding judge, and no defence having been made, the plaintiff obtained a verdict. A motion for a new trial, founded upon the defendant's affidavit uncorroborated by other evidence, and the allegations in which were met by counter affidavits, was refused. *Molson's Bank v. Bates*, 312.

## TRUSTEES.

*Under School Acts, where personally liable*.) See SCHOOL, I.

## VARIANCE.

See SCHOOL, 1.

## VERDICT.

*Setting aside.*.)—See TRIAL, 2.

## WAIVER.

See MORTGAGE, 1.

*Demurrer--Pleadings.*.)—See PLEADING.

## WARRANTY.

*Damages.*.)—The defendant sold plaintiff a stallion, warranting him to be a good coverer and foal-getter. The horse turned out worthless as a foal-getter. The jury found for plaintiff and £150 damages. The

court, although considering the damages too high, refused a new trial, it being a matter entirely within the province and discretion of the jury. *Natrass v. Nightingale* 266.

## WATER COURSE.

*Obstruction of.*.)—See COMMON LAW PROCEDURE ACT. 1.

## WRIT.

*Of attachment.*.)—See ATTACHMENT.

## WRONGFUL DISTRESS.

*Demurrer.*.)—Count in a declaration for a wrongful distress, admitting that *some* rent was due. *Held*, bad on demurrer.—*Cochran v. Welsh*, 21.









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